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IN THE

Supreme Court of the United States

RONNIE ADCOCK *et al.*,
Petitioners,

v.

FREIGHTLINER LLC *et al.*,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

WILLIAM L. MESSENGER
Counsel of Record
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Counsel for Petitioners

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QUESTION PRESENTED

Section 302(a)(2) of the Labor Management Relations Act makes it unlawful for employers to deliver "any money or other thing of value . . . to any labor organization," with exceptions inapplicable here. 29 U.S.C. § 186(a)(2). Is employer assistance with organizing nonunion employees a "thing of value" to a labor organization under § 302, including:

1. captive audience meetings for the union, on company paid time and property, at which employee attendance is mandatory;
2. use of company property for organizing; and
3. prohibitions of speech by management against the union and unionization?

PARTIES TO THE PROCEEDINGS BELOW

The parties before this Court are Employee Petitioners Ronnie Adcock, Tim Cochrane, and Kristi Jones; and Respondents International Union, United Automobile and Agricultural Implement Workers of America (UAW) and Freightliner LLC. Tom Cochrane and Katherine Ivey were Plaintiff-Appellants before the Fourth Circuit but are no longer parties due to illness and death, respectively.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
I. FACTS	3
II. PROCEEDINGS BELOW	5
REASONS FOR GRANTING THE WRIT	7
I. SUMMARY	7
II. THIS CASE IS EXCEPTIONALLY IMPORTANT BECAUSE THE CIRCUIT COURT HAS CREATED A HUGE EXEMPTION FROM THE PLAIN LANGUAGE OF § 302 FOR THINGS OF VALUE THAT ASSIST UNION ORGANIZING	9
A. Section 302 Strictly Prohibits Unions from Receiving Anything of Value from Employers to Protect the Integrity of Collective Bargaining	9
B. Employer Assistance with Organizing Is Something of Great Value to Unions	12

TABLE OF CONTENTS—Continued

Page

C. The Circuit Court's Creation of an Exemption from § 302 for Employer Assistance with Organizing Is Wholly Untenable 18

III. THE EXEMPTION OF ORGANIZING ASSISTANCE FROM § 302 IS EXCEPTIONALLY DAMAGING BECAUSE IT THREATENS THE INTEGRITY OF COLLECTIVE BARGAINING 19

A. Union Self-Dealing Is Inimical to Collective Bargaining 20

B. Unions Will Compromise Employee Interests in Collective Bargaining as a Quid Pro Quo for Organizing Assistance from Employers 21

C. Exempting Organizing Assistance from § 302 Will Lead to Widespread Union Extortion of Employers for Such Assistance 23

D. Section 302 Prohibits Self-Dealing by Unions, Not Just Union Officials 24

IV. THE COURT NEEDS TO RESOLVE THE CIRCUITS' CONFLICT CONCERNING THE PROPER INTERPRETATION OF THE TERM "THING OF VALUE" 26

A. The Fourth and Third Circuits' Narrow Interpretation of "Thing of Value" Is Inconsistent with the Broad Interpretation Adopted by Other Circuits 26

TABLE OF CONTENTS—Continued

Page

B. The Court Should Resolve This Split of Authority Because "Thing of Value" Is Used in Numerous Federal Criminal Statutes 33

CONCLUSION 35

APPENDIX

A. Opinion of the United States Court of Appeals for the Fourth Circuit (23 Dec. 2008) 1a

B. Order of the United States District Court for the Western District of North Carolina (9 Nov. 2006) 15a

C. Order of the United States Court of Appeals for the Fourth Circuit Denying Petition for Rehearing En Banc (22 Jan. 2009) 19a

D. Memorandum of National Labor Relations Board, Office of General Counsel, Division of Advice, in Thomas Built Buses (Int'l Union, UAW), Case No. 11-CA-20038 *et seq.* (17 Dec. 2004) 20a

E. Tentative Agreement By and Between Freightliner LLC and UAW for the Purpose of Establishing a Card Check Procedure 39a

F. Agreement on Preconditions to a Card Check Procedure Between Freightliner LLC and the UAW 42a

TABLE OF AUTHORITIES

CASES Page

Aguinaga v. United Food & Commercial Workers, 993 F.2d 1463 (10th Cir. 1993). 22

Air Line Pilots v. O'Neill, 499 U.S. 65 (1991) 10, 20

Arroyo v. United States, 359 U.S. 419 (1959) ..... *passim*

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) 16

Brogan v. United States, 522 U.S. 398 (1988) 18

Carpenter v. United States, 484 U.S. 19 (1987) 31

Chamber of Commerce v. Brown, 128 S. Ct. 2408 (2008) 12, 14

Dana Corp. (International Union, UAW), 341 N.L.R.B. 1283 (2004) 12

Food Lion, Inc. v. UFCW, 103 F.3d 1007 (D.C. Cir. 1997) 14

Hotel Employees Union v. Sage Hospitality, 390 F.3d 206 (3d Cir. 2004) 6, 14, 29, 31

Local 144, Nursing Home Pension Fund v. Demisay, 508 U.S. 581 (1993) 15, 32

MMAC v. Milwaukee County, 431 F.3d 277 (7th Cir. 2005) 14

Morissette v. United States, 342 U.S. 246 (1952) 32

NLRB v. BASF Wyandotte Corp., 798 F.2d 849 (5th Cir. 1986) 8, 29

TABLE OF AUTHORITIES—Continued

Page

NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261 (1938) 22

Patterson v. Heartland Industrial Partners, 428 F. Supp. 2d 714 (N.D. Ohio 2006) 14

Pichler v. UNITE, 228 F.R.D. 230 (E.D. Pa. 2005), *aff'd*, 542 F.3d 380 (3d Cir. 2008) 13

Plastech Engineered Products, Inc. (International Union, UAW), 2005 WL 4841723 (NLRB Div. of Advice Memo. 2005) 14

Salinas v. United States, 522 U.S. 52 (1997) 18, 32

Smithfield Foods v. UFCW, 585 F. Supp. 2d 789 (E.D. Va. 2008) 14, 34

Thomas Built Buses (International Union, UAW), Case No. 11-CA-20038 (NLRB Div. of Advice Memo. 2004) 5

United States v. Barger, 931 F.2d 359 (6th Cir. 1991) 31

United States v. Collins, 56 F.3d 1416 (D.C. Cir. 1995) 28, 33

United States v. Croft, 750 F.2d 1354 (7th Cir. 1984) 28, 30

United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976) 31

TABLE OF AUTHORITIES—Continued

Page

United States v. Freeman, 208 F.3d 332 (1st Cir. 2000) 29

United States v. Girard, 601 F.2d 69 (2d Cir. 1979) 26, 27, 31, 32

United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986) 17, 27

United States v. Gotti, 459 F.3d 296 (2d Cir. 2006) 30

United States v. Jeter, 775 F.2d 670 (6th Cir. 1985) 27, 30, 34

United States v. Lanni, 466 F.2d 1102 (3d Cir. 1972) 11

United States v. Marmolejo, 89 F.3d 1185 (5th Cir. 1996) 27, 32, 33

United States v. Matzkin, 14 F.3d 1014 (4th Cir. 1994) 31

United States v. May, 625 F.2d 186 (8th Cir. 1980) 28, 30

United States v. Moore, 525 F.3d 1033 (11th Cir. 2008) 17, 28

United States v. Nilsen, 967 F.2d 539 (11th Cir. 1992) ..... *passim*

United States v. Roth, 333 F.2d 450 (2d Cir. 1964) 17

United States v. Ryan, 350 U.S. 299 (1956) 10, 15, 24, 32

United States v. Ryan, 232 F.2d 481 (2d Cir. 1956) 11

TABLE OF AUTHORITIES—Continued

Page

United States v. Schiffman, 552 F.2d 1124 (5th Cir. 1977) 29

United States v. Schwartz, 785 F.2d 673 (9th Cir. 1986) 17, 21, 28, 32

United States v. Sheker, 618 F.2d 607 (9th Cir. 1980) 31

United States v. Sun Diamond Growers, 526 U.S. 398 (1999) 10, 32

United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969) 30

United States v. Williams, 705 F.2d 603 (2d Cir. 1983) 17, 27

United *States v. Zouras*, 497 F.2d 1115 (7th Cir. 1974) 8, 28, 30

Wallace Corp. v. NLRB, 323 U.S. 248 (1944) 25

Wyman Gordon Co. v. NLRB, 397 F.2d 394 (1st Cir. 1968), *rev'd on other grounds* 394 U.S. 759 (1969) 31

STATUTES

5 U.S.C. § 7353 ..... 8, 26, 33
18 U.S.C. § 201 ..... *passim*
18 U.S.C. § 641 ..... *passim*
18 U.S.C. § 666 ..... *passim*
18 U.S.C. § 876 ..... *passim*
18 U.S.C. § 912 ..... 8, 26, 33
18 U.S.C. § 1001 18
18 U.S.C. § 1951 ..... 30, 34
18 U.S.C. § 1954 ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

18 U.S.C. § 1961 *et seq* 5
28 U.S.C. § 1254 ..... 2, 8
28 U.S.C. § 1291 6
National Labor Relations Act, 29 U.S.C. § 159(a) 7, 10, 25
Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 186 ..... *passim*

LEGISLATIVE HISTORY

Labor Management Reporting & Disclosure Act of 1959,

H.R. Rep. No. 86-741 (1959), *reprinted* 1959 U.S.C.C.A.N. 2318 10
S. Rep. No. 86-187 (1959), *reprinted* 1959 U.S.C.C.A.N. 2318 ..... 11, 20, 24
S. Rep. No. 98-225 (1984), 1984 U.S.C.C.A.N. 3182 23

Labor Management Relations Act of 1947,

92 Cong. Rec. 4891 (Sen. Byrd) 11
92 Cong. Rec. 4893 (Sen. Byrd) 25
92 Cong. Rec. 4895 (Sen. Wheeler) 10
92 Cong. Rec. 4900 (Sen. Pepper) 10
92 Cong. Rec. 5428 (Sen. Hatch) 11
93 Cong. Rec. 4679 (Sen. Ball) 10
93 Cong. Rec. 4746 (Sen. Taft) 23

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Charles I. Cohen *et al.*, *ResistingIts Own Obsolescence-How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y, 521 (2006) 13, 14

TABLE OF AUTHORITIES--Continued

Page

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A. Eaton & J. Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42 (2001) 13

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Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 Empl. Rel. L.J. 21 (Spring 1999) 13

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PETITION FOR A WRIT OF CERTIORARI

Employee Petitioners respectfully submit this petition for a Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 550 F.3d 369 (23 Dec. 2008), rehearing en banc denied (22 Jan. 2009). The opinion of the District Court for the Western District of North Carolina is not reported, but is available at 2006 WL 3257044 (9 Nov. 2006).

JURISDICTION

On 23 December 2008, the Fourth Circuit affirmed a district court judgment that dismissed this case for failure to state a claim. (App. 1a). A timely petition for rehearing en banc was denied on 22 January 2009. (App. 19a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 302 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186, provides in relevant part:

> (a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations
>
> It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value
>
> > (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
> >
> > (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
> >
> > . . .

> (b) Request, demand, etc., for money or other thing of value
>
> (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

Section 302(c) provides for nine (9) "exceptions" to the prohibitions of §§ 302(a) and (b). 29 U.S.C. § 186(c). It is undisputed that none applies here.

STATEMENT OF THE CASE

This case concerns a scheme in which an employer (Freightliner) agreed to assist a union (the UAW) in becoming the exclusive representative of its employees in exchange, quid pro quo, for the union's secret agreement to make wage, benefit, and other concessions at employees' expense in collective bargaining. At issue is whether the assistance Freightliner provided to the UAW—captive audience meetings, access to nonunion facilities, and a gag-clause on company speech—are "thing[s] of value . . . to any labor organization" under § 302(a)(2) of the LMRA.

I. FACTS

1. Freightliner is a truck manufacturer. In December 2002, it entered into two interrelated agreements with the UAW: the "Card Check" and "Preconditions to a Card Check" Agreements. (App. 39a, 42a).

In the Card Check Agreement, Freightliner agreed to assist the UAW in organizing its nonunion employees by: (1) conducting mass meetings for the

UAW, on company paid-time and property, at which employee attendance was compulsory; (2) granting the UAW use of its nonunion facilities for organizing; and (3) instituting a gag-clause prohibiting negative speech about the UAW by the company. (*Id.* 40a-41a). Freightliner also agreed to recognize the union as the representative of its employees without a secret-ballot election. (*Id.* 39a).

In exchange, the UAW secretly agreed in the Preconditions Agreement to make concessions at the expense of any employees it organized when collectively bargaining with Freightliner as the employees' representative. (App. 43a-44a). These pre-negotiated concessions involved employee wages, benefits, transfer rights, severance pay, overtime, strikes, pattern agreements, subcontracting, job qualifications, and overtime. (*Id.*).

In addition, the UAW secretly agreed to make concessions at the expense of employees it already represented at a Freightliner facility in Mt. Holly, North Carolina. The UAW agreed to freeze the employees' wages for three years, cancel their profit sharing bonus, and increase their benefit payments to obtain organizing assistance from Freightliner.

2. Freightliner and the UAW enforced their arrangement at two nonunion Freightliner facilities in Gastonia and Cleveland, North Carolina. Freightliner installed the UAW as its employees' representative by compelling the employees to attend mass union meetings on paid work time, allowing UAW organizers to solicit support in the facilities, and gagging speech against the union by management personnel. In subsequent collective bargaining, the UAW made the pre-arranged wage, benefit, and other

concessions at the expense of the employees it now represented. However, the UAW concealed from these Freightliner employees its contractual obligation under the Preconditions Agreement to make these concessions.

Freightliner and the UAW next attempted to enforce their arrangement at a Freightliner subsidy called Thomas Built Buses. An employee challenged that attempt by filing unfair labor practice charges with the National Labor Relations Board (NLRB). The NLRB General Counsel concluded that the captive audience meetings, union access, and Preconditions Agreement were unlawful under the National Labor Relations Act (NLRA) and issued a complaint against the UAW and Freightliner. *See Thomas Built Buses (Int'l Union, UAW)*, Case No. 11-CA-20038 (NLRB Div. of Advice Memo. 2004) (App. 20a, 27a-28a). To settle the case, Freightliner and the UAW agreed to cease their scheme.

II. PROCEEDINGS BELOW

Employee Petitioners, for a putative class of Freightliner employees, filed suit against the UAW and Freightliner under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*, to recover damages they incurred as a result of the UAW sacrificing their wages and benefits for organizing assistance. The suit is predicated on § 302 of the LMRA, which prohibits employers from delivering "any money or other thing of value . . . to any labor organization," and prohibits unions from receiving the same. 29 U.S.C. §§ 186(a)(2) & (b)(1). The complaint alleges that the forms of organizing assistance Freightliner provided the UAW for con-

cessions—compulsory mass meetings on paid time, use of company property, and a gag-clause—are each a "thing of value" to the UAW under § 302.

The Fourth Circuit affirmed a district court order dismissing the complaint for failure to state a claim. (App. 14a).[1] The court held that the organizing assistance—which the UAW demanded, gave consideration for, and used to organize thousands of employees—was not a "thing of value" to the union, (id. 9a), and had no ascertainable value whatsoever. (*Id.* 11a). Incongruously, however, the court found that this assistance "serve[d] the interests of . . . the Union." (*Id.* 10a).

The Fourth Circuit noted that its decision is consistent with a Third Circuit opinion holding that employer assistance with organizing is not a "thing of value" to a union, even though it "benefits" the union "with efficiency and cost saving." (*Id.* 12a) (*quoting Hotel Employees Union v. Sage Hospitality*, 390 F.3d 206, 219 (3d Cir. 2004)). However, the court explicitly refused to address the voluminous case law from other circuits that construes the phrase "thing of value" to include the types of things at issue here. (App. 11a fn.3).

The Fourth Circuit concluded that "an agreement setting forth ground rules to keep an organizing campaign peaceful does not involve the delivery of a 'thing of value' to a union." (*Id.* 12a). Thus, through use of the euphemism "ground rules" to describe captive audience meetings, use of company property, and a gag clause, the court effectively declared

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[1] The appellate court had jurisdiction under 28 U.S.C. § 1291.

employer assistance with organizing nonunion employees exempt from § 302.

REASONS FOR GRANTING THE WRIT

I. SUMMARY

1. This case presents the most important issue in modern labor law: can unions self-deal for organizing assistance from employers? Federal law empowers unions to act as the exclusive representative of employees in collective bargaining with their employer over wages and other terms of employment. 29 U.S.C. § 159(a). To protect the integrity of this process, § 302 strictly prohibits unions from receiving "any money or other thing of value" from employers, with exceptions that do not include organizing assistance.

Nevertheless, in recent years unions have increasingly turned to demanding organizing assistance from employers to replenish their dwindling membership ranks. This includes access to nonunion facilities, information about nonunion employees, gag-clauses on anti-union speech, pro-union captive audience meetings, and bans on secret-ballot elections.

The Fourth Circuit tore a gaping hole in § 302 by exempting these "thing[s] of value" from the statute. There is nothing unions value more from employers than assistance with organizing their employees. This exemption threatens the very integrity of collective bargaining, as unions will sacrifice employees' interests at the bargaining table to obtain organizing assistance from their employer, as the UAW did here. The Court should issue the Writ to resolve this issue of exceptional importance.

2. The Writ should also be granted because there is a circuit split regarding the proper interpretation of "thing of value." The Fourth and Third Circuits have adopted a narrow interpretation of this phrase that conflicts with the broad interpretations adopted by the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits that encompass tangible and intangible services. *See cases cited infra* pp. 27-28. This includes the Fifth Circuit's conclusion that use of company property is a "thing of value" to a union under § 302, *see NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 (5th Cir. 1986), and the conclusions of the Seventh and Eleventh Circuits that control over the speech of an adverse party is a "thing of value." *See United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir. 1974); *United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992).

This Court should settle how "thing of value" is interpreted because it is a term of art used in numerous criminal statutes. This includes conflict of interest statutes that govern federal employees, 5 U.S.C. § 7353, public officials, 18 U.S.C. § 201, recipients of federal funds, 18 U.S.C. § 666, and trustees of employee benefit plans, 18 U.S.C. § 1954, as well as statutes that prohibit the wrongful taking of a "thing of value." See 18 U.S.C. § 641 (conversion); 18 U.S.C. § 876(b) (extortion by mail); 18 U.S.C. § 912 (false pretenses). The Fourth and Third Circuits' holdings that the plain meaning of "thing of value" does not encompass such ubiquitous things as use of physical property, paid services of personnel, useful information, and communications will dramatically limit the scope of these statutes, not just § 302.

II. THIS CASE IS EXCEPTIONALLY IMPORTANT BECAUSE THE CIRCUIT COURT HAS CREATED A HUGE EXEMPTION FROM THE PLAIN LANGUAGE OF § 302 FOR THINGS OF VALUE THAT ASSIST UNION ORGANIZING

Section 302(a)(2) strictly prohibits employers from delivering any "thing of value . . . to any labor organization," except as expressly permitted by § 302(c). Employer assistance with organizing is something of great value to labor organizations that is not permitted by § 302(c). By exempting such "thing[s] of value" from § 302, the Fourth Circuit has done exceptional violence to the plain language of the statute.

A. Section 302 Strictly Prohibits Unions From Receiving Anything of Value from Employers to Protect the Integrity of Collective Bargaining

Section 302(a)(2) makes it unlawful for employers "to pay, lend, or deliver, any money or other thing of value . . . to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer." 29 U.S.C. § 186(a)(2). Section 302(b)(1) reciprocally makes it unlawful for unions to "request, demand, receive, or accept . . . any money or other thing of value prohibited by subsection (a)." *Id.* § 186(b)(1). Section 302(c) states nine exceptions to the general prohibitions of subsections (a) and (b), none of which applies here. *Id.* § 186(c).

"[A] literal construction of § 302 does no violence to common sense." *Arroyo v. United States*, 359 U.S. 419, 424 (1959). The statute simply makes it unlawful for employers to provide anything of value to the current or prospective union representative of its employees, except as permitted by § 302(c). *See United States v. Sun Diamond Growers*, 526 U.S. 398, 408-09 (1999); *United States v. Ryan*, 350 U.S. 299, 305 (1956). This is the interpretation Congress intended.[2]

Section 302 was enacted to safeguard "the integrity of the collective bargaining process." *Arroyo*, 359 U.S. at 425. In collective bargaining, unions act as the exclusive representative of units of employees for the purpose of bargaining with their employer over wages, benefits, and terms of employment. 29 U.S.C. § 159(a). This is a fiduciary relationship, akin to that between trustee and beneficiary or attorney and client. *See Air Line Pilots v. O'Neill*, 499 U.S. 65, 74-75 (1991).

Congress recognized that union receipt of anything of value from an employer conflicts with a union's

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[2] *See* H.R. Rep. No. 86-741 (1959), *reprinted* 1959 U.S.C.C.A.N. 2318, 2469 ("it is illegal for an employer to pay or deliver anything of value to a representative of his employees, except in those instances permitted by subsection (c)"); 92 Cong. Rec. 4900 (Sen. Pepper) ("under the language of the amendment, it would be unlawful for any representatives of employees . . . to receive anything of benefit or value from the management"); 92 Cong. Rec. 4895 (Sen. Wheeler) ("This language clearly goes so far as to make the employer guilty of violation of the law if he contributed anything to the union for the benefit of the union."); 93 Cong. Rec. 4679 (Sen. Ball) (§ 302 is "simply a broad prohibition of payment or delivery by an employer of any money or other thing of value").

duties to employees in collective bargaining. *See United States v. Lanni*, 466 F.2d 1102, 1104-05 (3d Cir. 1972) (quoting legislative history at length). "For centuries the law has forbidden any person in a position of trust to hold interests or enter into transactions in which self interest may conflict with complete loyalty to those whom they serve." *Id.* at 1104 (*quoting* S. Rep. No. 86-187 (1959), *reprinted* 1959 U.S.C.C.A.N. 2318, 2330). For example, "a lawyer knows full well that he, representing a client, would not take a gift from the opposition." 92 Cong. Rec. 5428 (Sen. Hatch). The danger Congress sought to avert was "corruption of collective bargaining through bribery of employee representatives by employers," "extortion by employee representatives," and abuse of employee welfare funds. *Arroyo*, 359 U.S. at 425-26.

Congress dealt with this conflict of interest problem by simply prohibiting employers from delivering anything of value to the current or potential union representative of their employees, except as expressly permitted in § 302(c). "The propriety of any gift to a fiduciary with whose beneficiaries the donor is apt to come into competition, is surely open to scrutiny, and it is a reasonable way of dealing with the evils that may be involved to taboo all." *United States v. Ryan*, 232 F.2d 481, 483 (2d Cir. 1956) (per curiam).

Only legitimate collective bargaining is permitted by § 302: employer delivery of money and things to *employees*. Section 302(a) "does not prohibit the employee himself from accepting money or other thing of value if it is directly paid to the employee by the employer." 92 Cong. Rec. 4891 (Sen. Byrd). Section 302(c) exempts legitimate employee benefits

that result in the delivery of money or things to the employees' union representative. In this manner, § 302 safeguards collective bargaining by mandating that unions can only deal with employers as a representative of employees, and not for the unions' self-interests.

B. Employer Assistance with Organizing Is Something of Great Value to Unions

1. *Unions Aggressively Seek Organizing Assistance from Employers and Will Compromise Employee Interests to Obtain It*

Notwithstanding § 302's prohibition on union receipt of anything of value from employers, in recent years unions have turned to demanding employer assistance with organizing. Gaining more dues-paying members is a top priority for unions, as their membership has been in general decline for decades.[3] But unions have been unable to convince employees to choose unionization voluntarily at union-desired rates under the "bottom up" organizing procedures the NLRA favors, i.e., secret-ballot elections that feature a free and open debate about unionization.[4]

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[3] *See* Laura J. Cooper, *Privatizing Labor Law: Neutrality/Check Agreements and the Role of the Arbitrator*, 83 Ind. L.J. 1589, 1591 (2008).

[4] *See id.* at 1591-92 (unions blame NLRA election procedures and employer opposition for decline in membership); *see also Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2413-14 (2008) (NLRA encourages free and robust debate between management and unions); *Dana Corp.*, 341 N.L.R.B. 1283 (2004) (secret-ballot elections preferred under NLRA).

Consequently, unions have turned to organizing employees from the "top-down" with the assistance of their employer.[5] This assistance often includes gag-clauses on employer speech about the union, access to nonunion facilities, information about nonunion employees, pro-union captive audience meetings, and bans on secret-ballot elections conducted by the NLRB.[6] Not surprisingly, union success rates in organizing campaigns increase dramatically with employer assistance.[7]

To obtain organizing assistance, unions often aggressively pressure employers with picketing and comprehensive "corporate campaigns."[8] The latter

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[5] See Cooper, 83 Ind. L.J. at 1593-94; Charles I. Cohen et al., *Resisting its Own Obsolescence–How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 522 (2006); A. Eaton & J. Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42 (2001); *see also Jonathan P. Hiatt & Lee W. Jackson, Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176 (1996) (AFL-CIO General Counsel urging that unions "use strategic campaigns to secure recognition . . . outside the traditional representation processes").

[6] *See* Cohen, 20 Notre Dame J.L. Ethics & Pub. Pol'y at 522-23; Eaton & Kriesky, 55 Indus. & Lab. Rel. Rev. at 47-48.

[7] *See* Cohen, 20 Notre Dame J.L. Ethics & Pub. Pol'y at 523; Eaton & Kriesky, 55 Indus. & Lab. Rel. Rev. at 51-53; Cooper, 83 Ind. L.J. at 1593-94.

[8] *See* Cooper, 83 Ind. L.J. at 1592-93; Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 Empl. Rel. L.J. 21 (Spring 1999); *see also* Herbert R. Northrup & Charles H. Steen, *Union 'Corporate Campaigns' as Blackmail: the RICO Battle at Bayou Steel*, 22 Harv. J.L. & Pub. Pol'y 771, 779-93 (1999) (describing tactics of a corporate campaign); *Pichler v. UNITE*, 228 F.R.D. 230, 234-40 (E.D. Pa. 2005), *aff'd*, 542 F.3d

involve a "'wide and indefinite range of legal and potentially illegal tactics,' including "'litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state and federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public.'" *Smithfield Foods v. UFCW*, 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008) (*quoting Food Lion, Inc. v. UFCW*, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997)); *see supra* note 8. Unions also seek enactment of state and local laws that require or pressure employers to assist their organizing campaigns.[9]

In addition to those "sticks," unions also offer employers the "carrots" of bargaining concessions and guarantees of labor peace to enter into organizing agreements.[10] The Preconditions Agreement here is

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380 (3d Cir. 2008) (corporate campaign for an organizing agreement); *Smithfield Foods v. UFCW*, 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008) (same).

[9] *See, e.g., Chamber of Commerce*, 128 S. Ct. at 2411-12 (2008) (preempted state law prohibited use of state funds to deter union organizing, but permitted enforcement of organizing agreements); *MMAC v. Milwaukee County*, 431 F.3d 277, 277-78 (7th Cir. 2005) (preempted ordinance required contractors to enter into union "labor peace" agreements); *Sage Hospitality*, 390 F.3d at 208-09 (city made organizing agreement a condition of tax increment financing for hotel);

[10] *See Patterson v. Heartland Indus. Partners*, 428 F. Supp. 2d 714, 716 (N.D. Ohio 2006) (employer "receive[d] the union's assurance of no strikes and other guarantees related to wages in return for providing the defendant union with worker addresses and by making plant facilities available to the union") (moot on appeal); Cohen, 20 Notre Dame J.L. Ethics & Pub. Pol'y at 533-34 (union pre-negotiated concessions for organizing assistance); *Plastech Eng. Prod., Inc. (Int'l Union, UAW)*, 2005 WL 4841723,

an example of such a sweetheart deal. (App. 43a). These concessions cost unions nothing, as the price is paid by employees who are often unaware that their interests are being bargained away.

In short, there is nothing that most unions value more from an employer than assistance with organizing its employees. Yet, the Fourth Circuit has declared employer assistance with organizing not to be a "thing of value . . . to any labor organization" under § 302.

2. *The Forms of Organizing Assistance at Issue Are "Thing[s] of Value" to a Union*

Section 302's "prohibitions . . . are drawn broadly." *Local 144, Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 585 (1993); *see also Ryan*, 350 U.S. at 305; *Arroyo*, 359 U.S. at 420. As discussed later, "thing of value" is a statutory term of art that has long been construed to encompass both tangible and intangible services. *See infra* pp. 27-28.

Captive audience meetings on paid work time, use of company property for organizing, and gag-clauses on anti-union speech are each "thing[s] of value" to a union within the plain meaning of that phrase. This assistance provided the UAW with such ubiquitous things as: (1) the paid services of personnel (company officials conducted the compulsory mass meetings and employees were paid to attend); (2) use of

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*1-2 (NLRB Div. of Advice Memo. 2005) (same); Hiatt & Jackson, 12 Lab. Law. at 176-77 ("Negotiations over non-Board recognition procedure often spill over to discussing the terms of a future collective bargaining agreement.").

physical property (use of Freightliner's facilities for organizing), and (3) control over communications (the gag-clause). These common services are used, bought, or sold by almost every organization in existence. For example, the UAW itself pays for the services of personnel (i.e., wages and salaries), use of physical property (i.e., rent), and communications (i.e., soliciting and advertising). Here, the UAW received these types of services from Freightliner to assist its organizing ambitions.

The organizing assistance certainly had "value" to the UAW. The union demanded it, gave consideration to obtain it, and used the assistance to quickly organize thousands of dues-paying members into its ranks.

The Fourth Circuit's statement that the assistance has "no ascertainable value" is jaw-dropping for these reasons. (App. 11a, fn.3). It is akin to declaring that up is down, or that day is night. There is *nothing* that unions value more from an employer than assistance with gaining more dues-paying members. *See supra* pp. 12-15. That court itself acknowledged that the organizing assistance "serve[s] the interests of . . . the Union." (App. 10a).

Moreover, Employee Petitioners' complaint states that the "organizing assistance that Freightliner delivered to the UAW had significant value to the UAW." (Complaint, ¶¶ 22, 38, 47, 60) (emphasis added). This fact must be accepted as true on a motion to dismiss. *See, e.g., Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Even if monetary value is required under § 302 (which it

is not),[11] Employee Petitioners are entitled to an opportunity to prove monetary value at trial. They could easily do so with evidence regarding: the additional dues revenues the assistance generated for the UAW; the organizing expenses it saved the UAW; Freightliner's cost of providing the assistance, such as the wages paid to employees to attend the compulsory meetings; the market value of similar services; and the monetary value of the concessions the UAW made in exchange for the organizing assistance.

Indeed, an organization selling a product (such as the "vacuums" the Fourth Circuit cites at App. 9a) would pay handsomely for: (1) compulsory mass meetings, on company paid time and property, at which employees are urged to purchase the product; (2) the right to solicit in Freightliner's facilities; and (3) a prohibition on negative comments about the product. Here, the UAW effectively paid for such services with the wages and benefits of the employees it sought to organize.

Certainly, organizing assistance is not *worthless* to unions. Yet, that is exactly what the Fourth Circuit concluded: that, as a matter of law, the employer assistance the UAW and other unions aggressively seek, provide consideration for, and use to increase

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[11] Value in § 302 and similar statutes is not limited to monetary worth, but is measured subjectively by the desire of the recipient to obtain the thing. *See United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964) (construing § 302); *see also United States v. Moore*, 525 F.3d 1033, 1048 (11th Cir. 2008); *United States v. Schwartz*, 785 F.2d 673, 679 (9th Cir. 1986); *United States v. Gorman*, 807 F.2d 1299, 1304-05 (6th Cir. 1986); *United States v. Williams*, 705 F.2d 603, 622-23 (2d Cir. 1983). Employee Petitioners can establish monetary "value" if necessary.

their membership ranks has "no [ascertainable] value whatsoever." (App. 11a). The very notion defies credulity.

C. The Circuit Court's Creation of an Exemption From § 302 for Employer Assistance With Organizing is Wholly Untenable

This Court has warned that "courts may not create their own limitations on legislation." *Brogan v. United States*, 522 U.S. 398, 408 (1988). In *Salinas v. United States*, 522 U.S. 52 (1997), this Court rejected a judicially created "federal funds" limitation to a prohibition on government officials accepting "anything of value" because "[t]he statute's plain language fails to provide any basis for limiting [18 U.S.C. § 666(a)(1)(B)] to bribes affecting federal funds." *Id.* at 58. In *Brogan*, this Court rejected an "exculpatory no" exemption grafted onto 18 U.S.C. § 1001, and disavowed the "proposition that criminal statutes do not have to be read as broadly as they are written, but are subject to case by case exceptions." 522 U.S. at 406.

Here, the Fourth Circuit effectively created an organizing exemption to § 302's unambiguous prohibition by broadly declaring that "an agreement setting forth ground rules to keep an organizing campaign peaceful does not involve the delivery of a 'thing of value' to a union." (App. 12a).[12] Thus, through use of the euphemism "ground rules" to describe valuable employer services that facilitate

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[12] Freightliner's assistance to the UAW can be considered a means of keeping organizing "peaceful" only if eliminating opposition to the union is considered a just "peace."

union organizing, these "thing[s] of value . . . to any labor organization" were removed from the ambit of § 302(a)(2).

This judicial creation of a new organizing exemption from § 302 is untenable. Indeed, the statute already includes nine (9) express exemptions at § 302(c). An organizing exemption is not amongst them. As such, it is clear that Congress intended for no such exemption—expressio unius est exclusio alterius. In fact, the statute expressly prohibits employer delivery of money or things of value "to influence any other employees in the exercise of the *right to organize*." 29 U.S.C. § 186(a)(3) (emphasis added).

It is the prerogative of Congress, not the courts, to decide whether § 302 should be amended to exempt employer assistance with organizing from its prohibitions. The Fourth Circuit has usurped that role by declaring that several "thing[s] of value . . . to any labor organization"—captive audience meetings on paid work time, use of company property for organizing, and gag-clauses on employer speech—are not "thing[s] of value" to unions under § 302. The Court should take this case to restore the plain language of the statute.

III. THE EXEMPTION OF ORGANIZING ASSISTANCE FROM § 302 IS EXCEPTIONALLY DAMAGING BECAUSE IT THREATENS THE INTEGRITY OF COLLECTIVE BARGAINING

Exempting organizing assistance from § 302 means that unions may lawfully self-deal for such assistance while acting, or seeking to act, as an exclusive

representative of employees in collective bargaining. This threatens the very integrity of the process, as unions will sacrifice employee interests as quid pro quo for organizing assistance from their employer (just as the UAW did) and will demand such assistance as the extorted price for labor peace.

A. Union Self-Dealing Is Inimical to Collective Bargaining

As previously established, Congress prohibits unions from receiving anything of value from employers, except as permitted in § 302(c), to ensure union fidelity to employees in collective bargaining. *See supra* pp. 10-12. Permitting unions to self-deal for their organizing interests while acting, or seeking to act, as an employee representative undermines this intent. It is akin to permitting attorneys to seek assistance with client recruitment from an opposing party during litigation. Or permitting trustees to solicit business for themselves while acting for a beneficiary.[13] It creates the very conflict of interest § 302 exists to prevent.

"For centuries the law has forbidden any person in a position of trust to hold interests or enter into transactions in which self interest may conflict with complete loyalty to those whom they serve." S. Rep. No. 86-187 (1959), reprinted 1959 U.S.C.C.A.N. 2318, 2330. Congress intended to apply this basic fiduciary principal to collective bargaining with § 302. *Id.* The Fourth Circuit has subverted this intent and, in so doing, undermined the integrity of the fiduciary

[13] These analogies are apt, as this Court has analogized a union's duty to employees to the duties owed by these fiduciaries to their beneficiaries. *See O'Neill*, 499 U.S. at 74-75.

relationship upon which collective bargaining is predicated.

B. Unions Will Compromise Employee Interests in Collective Bargaining as a Quid Pro Quo for Organizing Assistance from Employers

Exempting organizing assistance from § 302 will corrupt collective bargaining because unions will compromise the interests of employees they exclusively represent and seek to represent to obtain these "thing[s] of value" from employers. *See* Preconditions Agreement (App. 43a); *supra* note 9. Indeed, employers can bribe the union representatives of their employees with organizing assistance as easily as they can with cash payments or any other "thing of value."

Persuasive on this point is the Ninth Circuit's rationale for concluding that "assistance in arranging for the merger of [two unions]" was a "thing of value" to the union trustees of an employee benefit plan under 18 U.S.C. § 1954:

> Congress was concerned with violations of trust and fiduciary duties by union fund trustees . . . . A violation of trust which is influenced by the offer of an intangible service is no less damaging to trust fund beneficiaries than if the influence was in the form of a cash kickback. The significant factor is that the trustee sufficiently valued the thing offered to compromise his integrity and position.

United States v. Schwartz, 785 F.2d 673, 680 (9th Cir. 1986). Similarly here, Congress was concerned about violations of trust by unions acting as exclusive

representatives of employees. The dispositive factor is that unions will violate that trust in exchange for things from employers that facilitate union organizing.

The UAW's conduct proves the point. The union secretly agreed to numerous concessions at employee expense in exchange for organizing assistance from Freightliner. This includes wage, benefit, transfer rights, severance, overtime, strike, subcontracting, job qualification, and overtime concessions in the Preconditions Agreement (App. 43a-44a), as well as a wage freeze and increase in benefits costs at the expense of represented employees in Mt. Holly, North Carolina.

The UAW's sweetheart deal for organizing assistance is as repugnant to legitimate collective bargaining as the UAW selling out employees in return for cash from Freightliner. It is an egregious breach of the union's fiduciary duty of loyalty to employees. *See Aguinaga v. UFCW*, 993 F.2d 1463, 1471 (10th Cir. 1993) (union breached duty of fair representation by secretly consenting to closure of employees' plant for assistance with organizing another plant). Freightliner's secret control over what the UAW could negotiate for employees under the Preconditions Agreement rendered collective bargaining a mockery. "Collective bargaining is a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals." *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 268 (1938).

Aggressive union demand for organizing assistance makes corrupt deals like that between the UAW and Freightliner a certainty if organizing assistance is

excluded from § 302. The statute must be enforced against these "thing[s] of value" because, otherwise, unions will compromise employee interests to obtain them.

C. Exempting Organizing Assistance From § 302 Will Lead to Widespread Union Extortion of Employers for Such Assistance

Unions will extort organizing assistance from employers if that is exempted from § 302. As previously established, many employers are already targets of wide ranging "corporate campaigns" to pressure them to enter into organizing agreements. *See supra* pp. 13-14.

Section 302 is intended "to deal with 'extortion or a case where the union representative is shaking down the employer.'" *Arroyo*, 359 U.S. at 426 n.8 (quoting 93 Cong. Rec. 4746 (Sen. Taft)). Congress sought to "prohibit[ ], among other things, the buying and selling of labor peace." S. Rep. No. 98-225 (1984), reprinted 1984 U.S.C.C.A.N. 3182, 3477.

Unions shaking down employers for services that assist organizing campaigns is just as wrongful as unions shaking down employers for cash to fund organizing campaigns. It defies Congress' intent that employers not have to tithe "any money or other thing of value" to unions as the extorted price for labor peace. Yet, aggressive union demand for organizing assistance makes such extortion a certainty if these "thing[s] of value" are exempted from § 302.

Clearly, "thing[s] of value" that facilitate union organizing—union captive audience meetings, use of

nonunion property, information about nonunion employees, and gag-clauses on employer communications—can and will be used for both "bribery of employee representatives by employers" and "extortion by employee representatives." *Arroyo*, 359 U.S. at 425-26. Exempting such assistance from § 302 is incompatible with congressional intent that the statute be "applicable to all forms of extortion or bribery in labor-management relations." S. Rep. No. 86-187 (1959), reprinted 1959 U.S.C.C.A.N. 2318, 2329.

D. Section 302 Prohibits Self-Dealing By Unions, Not Just Union Officials

The Fourth Circuit erred in concluding that Freightliner's delivery of organizing assistance to the UAW is not corrupting because it was not "a means of bribing representatives of the Union," but rather "serve[s] the interests of . . . the Union." (App. 10a). The purpose of § 302 is not to protect *unions* from their representatives. It is to protect *employees* from the union that represents or seeks to represent the employees in collective bargaining. See *Arroyo*, 359 U.S. at 425-26 (Congress was "concerned with corruption of collective bargaining through bribery of employee representatives" and "extortion by employee representatives").

The notion that § 302 is meant only to prevent bribery of union officials is untenable.[14] The statute

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[14] Indeed, § 302 was not held applicable to union officials, in addition to unions, until this Court's decision in *United States v. Ryan*, 350 U.S. 299 (1956). The "prohibitions upon *labor organization* action can be effective only if there are corresponding limitations or prohibitions on the individuals who act for the labor organization." *Id.* at 302 (emphasis added).

expressly prohibits employer delivery of any thing of value to "any labor organization" and to "any representative of any of his employees." 29 U.S.C. § 186(a)(2) & (1). As Senator Byrd stated when § 302 was proposed, "[t]he amendment provides . . . that the representatives of the employees, *which means the union*, shall not receive a tribute of this kind . . . . The amendment is very clear, short, and simple." 92 Cong. Rec. 4893 (emphasis added).

Section 302 prohibits employer delivery of anything of value to "any labor organization" because a union acts as the exclusive representative of employees in collective bargaining. *See* 29 U.S.C. § 159(a). Collective bargaining is not union officials bargaining for the union or its members, as the Fourth Circuit apparently believed. *See Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944) ("The duties of a bargaining agent . . . extend beyond the mere representation of the interests of its own group members.").

Accordingly, that Freightliner's assistance "serve[d] the interests of . . . the Union" is not exculpatory, but is damning. (App. 10a). It proves that the assistance is a "thing of value" to the UAW under § 302. That the UAW sacrificed employee interests for things that "serve the interests of . . . the Union" proves that the UAW's conduct is inimical to the collective bargaining process that § 302 protects. The Fourth Circuit's rationale that organizing assistance is not a "thing of value" to a union *because* it "serve[s] the interests of . . . the Union" places the statute on its head.

In summary, the exclusion of organizing assistance from § 302 is exceptionally damaging to collective bargaining because it permits unions to self-deal for

these "thing[s] of value" while acting, or seeking to act, as an exclusive representative of employees. This will inevitably lead to unions making wage and benefit concessions at employee expense as a quid pro quo for organizing assistance and to union extortion to obtain this assistance. Indeed, this is already occurring at an alarming rate notwithstanding questions as to the legality of this conduct. The Writ must be granted to resolve this question of exceptional importance.

IV. THE COURT NEEDS TO RESOLVE THE CIRCUITS' CONFLICT CONCERNING THE PROPER INTERPRETATION OF THE TERM "THING OF VALUE"

A. The Fourth and Third Circuits' Narrow Interpretation of "Thing of Value" Is Inconsistent with the Broad Interpretation Adopted by Other Circuits

The phrase "thing of value" is a statutory "term of art" that is used in numerous federal statutes. *United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979). In addition to § 302, the phrase or its synonym "anything of value" are used in conflict of interest statutes that govern federal officials, 5 U.S.C. § 7353(a), public officials, 18 U.S.C. § 201(b), recipients of federal funds, 18 U.S.C. § 666, and trustees of employee benefit plans, 18 U.S.C. § 1954. It is also used in statutes that prohibit wrongful takings, including conversion of public property, 18 U.S.C. § 641, extortion by mail, 18 U.S.C. § 876(b), and obtaining a "thing of value" by false pretenses, 18 U.S.C. § 912.

The term "thing of value" is construed as broad in scope and as encompassing intangibles by the Second, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh and D.C. Circuits:

> **Second Circuit**. *Girard*, 601 F.2d at 71 ("thing of value" is "generally construed to cover intangibles as well as tangibles" and encompasses information about a witness under 18 U.S.C. § 641); *United States v. Williams*, 705 F.2d 603, 622-23 (1983) ("The phrase 'anything of value' in bribery and related statutes has consistently been given a broad meaning" and encompasses worthless shares of stock under 18 U.S.C. § 201(b));
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> **Fifth Circuit**. *United States v. Marmolejo*, 89 F.3d 1185, 1191 (1996) (phrase "anything of value" is "broad in scope and contains no language restricting its application to transactions involving money, goods, or services" and encompasses conjugal visits under 18 U.S.C. § 666(a)(1)(B));
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> **Sixth Circuit**. *United States v. Jeter*, 775 F.2d 670, 680 (1985) ("Congress' very use of the more expansive 'thing of value' rather than 'property' strongly implies coverage beyond mere tangible entities" and encompasses information under 18 U.S.C. § 641); *United States v. Gorman*, 807 F.2d 1299, 1305 (1986) ("the term 'thing of value' must be broadly construed," with the focus "on the value which the defendant subjectively attaches to the items received," and encompasses loans and promises of future employment under 18 U.S.C § 201(g));

Seventh Circuit. *United States v. Zouras*, 497 F.2d 1115, 1121 (1974) ("thing of value" in 18 U.S.C. § 876 is "broad language" and encompasses intangible testimony of a witness); *United States v. Croft*, 750 F.2d 1354, 1361-62 (1984) ("thing of value" in 18 U.S.C. § 641 encompasses intangible service of an employee);

Eighth Circuit. *United States v. May*, 625 F.2d 186, 191-92 (1980) ("thing of value" in 18 U.S.C. § 641 encompasses intangibles, including use of aircraft and services of personnel);

Ninth Circuit. *Schwartz*, 785 F.2d at 680 ("that value commonly extends in scope to include intangibles has been the conclusion of various courts," and construing "thing of value" in 18 U.S.C. § 1954 to include assistance with arranging a union merger);

Eleventh Circuit. *United States v. Moore*, 525 F.3d 1033, 1048 (2008) ("the term 'thing of value' unambiguously covers intangible considerations" and encompasses sex under 18 U.S.C. § 201); *Nilsen*, 967 F.2d at 543 ("phrase 'thing of value' is a clearly defined term that includes intangible objectives" and encompasses the adverse testimony of a witness under 18 U.S.C. § 876);

D.C. Circuit Circuit. *United States v. Collins*, 56 F.3d 1416, 1419 (1995) (phrase "thing of value" in 18 U.S.C. § 641 includes intangibles, because "the language chosen by Congress could not have been broader," and encompasses computer time and storage).

By contrast, the Fourth and Third Circuits now construe "thing of value" very narrowly. In this case

and *Hotel Employees Union v. Sage Hospitality*, 390 F.3d 206, 219 (3d Cir. 2004), the courts held that use of physical property and control over company communications are not "thing[s] of value." *Adcock* also held that captive audience meetings conducted on paid work time are not a "thing of value," and *Sage Hospitality* that information about nonunion employees is not a "thing of value," 390 F.3d at 219.

This cramped interpretation of "thing of value" to exclude these tangible and intangible services is directly at odds with the broad interpretation adopted by the Second, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh and D.C. Circuits. As established below, the types of things at issue here and in *Sage Hospitality* easily constitute "thing[s] of value" under the law of the latter circuits.

Property. The Fifth Circuit held that use of company property is a "thing of value" to a union under § 302(a). *See BASF Wyandotte*, 798 F.2d at 856 & n.5;[15] *see also United States v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir. 1977) (use of hotel rooms a "thing of value" under § 302); *United States v. Freeman*, 208 F.3d 332, 341 (1st Cir. 2000) (access to property otherwise off limits "anything of value" under 18 U.S.C. § 666); *May*, 625 F.2d at 191-92 (use of government aircraft a "thing of value" under 18 U.S.C. § 641). The conclusion of the Third and Fourth Circuits that use of company property is not a "thing

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[15] The Fifth Circuit held that § 302(c)(1) exempted this "thing of value" from § 302(a) because the union officials who used the property were employees of the company. *BASF Wyandotte*, 798 F.2d at 856. This exemption is inapplicable here and does not change the fact that use of company property was held a "thing of value" under § 302(a).

of value" to a union under § 302 is in direct conflict with *BASF Wyandotte* and inconsistent with the other cited cases.

Services. The Ninth Circuit in *Schwartz* held that "assistance in arranging for the merger of [two unions], as well as other services" were a "thing of value" to union officials under 18 U.S.C. § 1954. 785 F.2d at 679-81. The Sixth, Seventh, and Eighth Circuits have similarly held that the services of personnel are "thing[s] of value." *Jeter*, 775 F.2d at 680 (construing 18 U.S.C. § 641); *Croft*, 750 F.2d at 1361-62 (same); *May*, 625 F.2d at 191-92 (same). The Fourth Circuit's conclusion that Freightliner's service of conducting mass meetings for the UAW, which company officials conducted and for which employees were paid to attend, is not a "thing of value" conflicts with these holdings.

Communications. The Eleventh and Seventh Circuits have held that control over the speech of an adverse party is a "thing of value." *See Nilsen*, 967 F.2d at 542-43 (testimony of adverse witness a "thing of value" under 18 U.S.C. § 876); *Zouras*, 497 F.2d at 1121 (same). The Second Circuit has held that non-competition agreements are forms of "property" under 18 U.S.C. § 1951. *See United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969); *United States v. Gotti*, 459 F.3d 296, 323 (2d Cir. 2006). The conclusions of the Fourth and Third Circuits that control over the speech of an adverse party (i.e., an employer in an organizing campaign) is not a "thing of value" is in direct conflict with *Nilsen* and *Zouras*, and inconsistent with *Tropiano*.

Information. The Second, Sixth, and Ninth Circuits have held that information is a "thing of

value." *See United States v. Barger*, 931 F.2d 359, 368 (6th Cir. 1991); *Girard*, 601 F.2d at 71; *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980). Indeed, "[c]onfidential business information has long been recognized as *property*." *Carpenter v. United States*, 484 U.S. 19, 26 (1987) (emphasis added). By contrast, the Third Circuit has held that a list of information about nonunion employees is not a "thing of value." *Sage Hospitality*, 390 F.3d at 219.

Overall, this case and *Sage Hospitality* are a dramatic departure from how "thing of value" has long been interpreted by federal courts. Prior to *Sage Hospitality*, no circuit construed the phrase "thing of value" so narrowly as to exclude these common types of things.[16] This includes the Third and Fourth Circuits themselves. *See, e.g., United States v. Matzkin*, 14 F.3d 1014, 1020 (4th Cir. 1994) (information a "thing of value" under 18 U.S.C. § 641); *United States v. DiGilio*, 538 F.2d 972 (3d Cir. 1976) (same).

The Fourth Circuit implicitly acknowledged the anomalous nature of its decision by explicitly refusing to "decide the extent to which intangible items may have value under § 302 or any other criminal statute prohibiting the delivery, conveyance, or acceptance of a 'thing of value.'" (App. 11a n.3).

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[16] *Wyman-Gordon Co. v. NLRB*, 397 F.2d 394 (1st Cir. 1968), *rev'd on other grounds* 394 U.S. 759 (1969), is not to the contrary. The case holds that an employer "supplying the Board with information, pursuant to a Board order, which the Board will give to all persons" including a union, is not unlawful under § 302. *Id.* at 396. This is correct because employer delivery of a "thing of value" pursuant to a Board order is permitted by § 302(c)(2).

The court did not even attempt to square its holding with how "thing of value" has long been interpreted by the courts under numerous statutes.

That many of the above cited cases arise under statutes other than § 302 does not diminish the stark split of authority regarding the proper interpretation of "thing of value." The Fourth Circuit held that the "plain language" of that phrase does not encompass paid mass meetings, use of property, and gag clauses. (App. 9a). By definition, the plain meaning of a common phrase is the same in all statutes that use it.

This is particularly true with respect to the phrase "thing of value" because it is a "term of art." *Nilsen*, 967 F.2d at 542; *Girard*, 601 F.2d at 71. "When Congress uses well settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition." *Salinas*, 502 U.S. at 63; *see Morissette v. United States*, 342 U.S. 246, 250 (1952). Courts routinely rely on cases arising under different statutes when construing "thing of value." *See Nilsen*, 967 F.2d at 543; *Girard*, 601 F.2d at 71; *Schwartz*, 785 F.2d at 680; *Marmolejo*, 89 F.3d at 1192.

There is no basis for believing that Congress used "thing of value" more narrowly in § 302 than in similar statutes. This Court has referred to § 302 as an example of a "broadly prophylactic criminal prohibition," *United States v. Sun Diamond Growers*, 526 U.S. 398, 408 (1999), and repeatedly held that § 302's "prohibitions . . . are drawn broadly." *Local 144, Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 585 (1993); *United States v. Ryan*, 350 U.S. 299, 305 (1956) (§ 302 a "broad prohibition"); *Arroyo*,

359 U.S. at 420 (same).[17] Legislative history also evidences an intent for a broad interpretation. *See supra* note 2. Yet, the Fourth and Third Circuit interpret "thing of value" in § 302 far more narrowly than the phrase is construed by other circuits.

B. The Court Should Resolve This Split of Authority Because "Thing of Value" Is Used in Numerous Federal Criminal Statutes

The narrow interpretation of "thing of value" adopted by the Fourth and Third Circuits limits not only the scope of § 302, but necessarily also the scope of similar statutes that forbid those in positions of trust from demanding or accepting "thing[s] of value." Consider the ramifications if use of property, services of personnel, control over communications, and information are not "thing[s] of value." These things could all lawfully be used to influence the official duties of federal employees, 5 U.S.C. § 7353; public officials, 18 U.S.C. § 201(b); recipients of federal funds, 18 U.S.C. § 666; and trustees of employee benefit plans, 18 U.S.C. § 1954. It would also be lawful to convert these types of things from the federal government under 18 U.S.C. § 641, to extort such things from others by use of mailed threats under 18 U.S.C. § 876, and to obtain such things by false pretenses under 18 U.S.C. § 912.

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[17] Even if § 302 were construed to require monetary value (which it does not require), that would not distinguish it from other statutes that use the term "thing of value." Both 18 U.S.C. §§ 641 and 666 expressly require monetary value, but are broadly construed to encompass intangibles. *See Collins*, 56 F.3d at 1419; *Marmolejo*, 89 F.3d at 1191.

Logically, the scope of statutes that use the term "property" is also limited by the Fourth and Third Circuits' rulings, as "property" is a less expansive term than "thing of value." *See Jeter*, 775 F.2d at 680. For example, the Hobbes Act prohibits extortion, which is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). If organizing assistance is not a "thing of value," it is certainly not "property." As such, unions can freely extort such assistance from employers through violence and other threats without regard to the Hobbes Act. This type of extortion is not a hypothetical threat. *See, e.g., Smithfield Foods*, 585 F. Supp. 2d at 809-10 (company stated triable claim that union was extorting "property" in the form of an organizing agreement under Hobbes Act).

The Fourth and Third Circuits' narrow interpretation of "thing of value" threatens the effectiveness of not only § 302, but other statutes that use the term. At the very least, it creates uncertainty as to what conduct many criminal statutes do and do not prohibit.

The widespread use of "thing of value" in federal criminal statutes requires guidance from this Court on how to interpret this term of art. The prior consensus amongst circuits that the term is broadly construed to include intangibles has been shattered by the narrow interpretation adopted by the Fourth and Third Circuits. The Writ should be granted to ensure a uniform interpretation of the term of art "thing of value."

CONCLUSION

Unions aggressively seek employer assistance with organizing and compromise employee interests to obtain it. Yet, the Fourth Circuit has deemed this type of employer assistance not to be a "thing of value . . . to any labor organization" under § 302(a)(2). The Court should grant the Writ of Certiorari to decide this important question of labor law and settle the conflict amongst circuits as to the meaning of the widely-used phrase "thing of value."

Respectfully submitted,

WILLIAM L. MESSENGER
Counsel of Record
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Counsel for Petitioners

April 21, 2009

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-2287

RONNIE ADCOCK; TIMOTHY COCHRANE; THOMAS COCHRANE; KATHERINE IVEY; KRISTI JONES,
Plaintiffs-Appellants,

v.

FREIGHTLINER LLC; INTERNATIONAL UNION, UNITED AUTOMOBILE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendants-Appellees.

NATIONAL LABOR RELATIONS BOARD,
Amicus Curiae.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.
Graham C. Mullen, Senior District Judge.
(3:06-cv-00032)

Argued: October 28, 2008
Decided: December 23, 2008

Before TRAXLER and KING, *Circuit Judges*, and HAMILTON, *Senior Circuit Judge*.

Affirmed by published opinion. Senior Judge Hamilton wrote the opinion, in which Judge Traxler and Judge King joined.

OPINION

HAMILTON, *Senior Circuit Judge*:

With certain exceptions not applicable in this case, § 302 of the Labor Management Relations Act (LMRA) prohibits, among other things, an employer from "pay[ing], lend[ing], or deliver[ing] . . . any money or other thing of value" to a labor union or labor union representative. 29 U.S.C. § 186(a). The issue presented in this appeal is whether Freightliner LLC (Freightliner) delivered "money or other thing[s] of value" to the International Union, United Automobile and Agricultural Implement Workers of America (the Union) pursuant to a card check agreement with the Union, wherein Freightliner agreed, among other things, to: (1) require some of its employees to attend, on paid company time, Union presentations explaining the card check agreement; (2) provide the Union reasonable access to nonwork areas in company plants to allow Union representatives to meet with employees; and (3) refrain from making negative comments about the Union during organizing campaigns. For the reasons stated below, we conclude that the district court correctly determined that Freightliner did not deliver a "thing of value" to the Union in violation of § 302. Accordingly, we affirm.

I

A

Freightliner owns several production facilities in North Carolina, including the Mt. Holly Truck Manu-

facturing Plant (Mt. Holly), the Gastonia Parts Manufacturing Plant (Gastonia), the Cleveland Truck Manufacturing Plant (Cleveland Truck), the Cleveland Parts Distribution Center (Cleveland Parts), the Thomas Built Buses Manufacturing Plant (Thomas Built), and the Freightliner Custom Chassis Manufacturing Plant (Custom Chassis). As of March 2002, the Union was the exclusive bargaining representative only of the employees at Mt. Holly. Around this time, the Union sought to organize and become the exclusive bargaining representative of the employees at Freightliner's other facilities in North Carolina, which were nonunion.

Negotiations between Freightliner and the Union ensued, which resulted in the signing of two agreements in December 2002. The first agreement (the Card Check Agreement) outlined the ground rules for the organizing campaigns. In the Card Check Agreement, Freightliner agreed with respect to each bargaining unit to forego a National Labor Relations Board election if a majority of the bargaining unit employees chose the Union as their exclusive bargaining representative by signing authorization cards. As part of the Card Check Agreement, Freightliner also agreed to: (1) require some of its employees to attend, on paid company time, Union presentations explaining the Card Check Agreement; (2) provide the Union reasonable access to nonwork areas in company plants to allow Union representatives to meet with employees; and (3) refrain from making negative comments about the Union during the organizing campaigns.[1]

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[1] Typically, a "card check" or "neutrality" agreement is an agreement between the employer and the union "in which they agree that (a) the employer will not speak for or against the

The second agreement signed by the parties was a preconditions agreement (the Preconditions Agreement). In the Preconditions Agreement, the Union made commitments as to its conduct if it were recognized as the exclusive bargaining representative of Freightliner's employees. Notably, the Union agreed that: (1) there would be "separate consideration in terms and conditions of employment for each Business Unit because of industry differences (trucks, parts, busses, fire and rescue, chassis) including competitive wage and benefits packages within comparative product markets"; (2) there would be "no

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union (neutrality) and/or (b) the employer will recognize the union if it can get signed authorization cards from a majority of the unit members (card-check)." Matthew T. Bodie, *The Market for Union Services: Reframing the Debate*, 94 Va. L. Rev. In Br. 23, 26-27 (2008). Neutrality agreements have been upheld by this and other courts. *See Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Facetglas, Inc.*, 845 F.2d 1250, 1253 (4th Cir. 1988) (holding neutrality and nondiscrimination provisions of election agreement enforceable under § 301 of the LMRA as "an agreement between an employer and a labor organization significant to the maintenance of labor peace between them") (citation and internal quotation marks omitted); *see also AK Steel Corp. v. United Steelworkers*, 163 F.3d 403, 406 (6th Cir. 1998) (upholding agreement preventing an employer from "demean[ing] the Union as an organization or its representatives as individuals" and interpretation preventing anti-union communication by employer); *Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 563 (2d Cir. 1993) (upholding agreement preventing an employer from interfering with union organizing effort or mounting a campaign with its employees opposing the union). Like the Card Check Agreement in this case, card check agreements typically include a provision allowing the union "access to the employer's physical property." James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 826 (2005).

guaranteed employment or transfer rights between Business Units or Plants"; (3) there would be "no provisions for severance pay . . . in the event of a layoff or plant closure"; (4) there would be "no strikes during the term of any collectively bargained agreement"; (5) there would be "no subcontracting prohibitions, provided economics reflect non-competitiveness"; (6) future "benefits cost increases, in excess of normal inflation, will be shared between the Company and the employees proportionately at a rate to be determined between the Company and its employees"; and (7) in consideration of Freightliner's financial turnaround objectives, there would be "no wage adjustments provided at any newly organized facility prior to mid-2003." (J.A. 17-18).

The ensuing organizing campaigns at Gastonia, Cleveland Truck, and Cleveland Parts resulted in the Union becoming the exclusive bargaining representative at these facilities in the first part of 2003. In June 2003, Freightliner and the Union, on behalf of the Mt. Holly employees, entered into a collective bargaining agreement (CBA), which provided, among other things, that: (1) there would be no increase in employee wages for the first three years of the CBA; (2) the employees' profit sharing bonus would be canceled; and (3) the employees would increase their share of employee benefit payments. In December 2003, Freightliner and the Union, on behalf of the employees at the Gastonia, Cleveland Truck, and Cleveland Parts facilities, entered into CBAs.

In March 2004, a majority of the employees at Thomas Built signed authorization cards choosing the Union as their exclusive bargaining representative. Consequently, Freightliner recognized the Union as the exclusive bargaining representative of

these employees. On April 14, 2004, Jeff Ward, a Thomas Built employee, filed unfair labor practice charges against the Union and Freightliner. After reviewing these charges, General Counsel for the NLRB issued a complaint on October 13, 2004 alleging that Freightliner and the Union violated the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, by "bargaining and entering into an agreement regarding employee terms and conditions of employment prior to the [Union] enjoying the support of a majority of employees." (J.A. 29). The complaint also alleged that Freightliner violated the NLRA by assisting the Union with the solicitation of union authorization cards from employees at Thomas Built and by recognizing the Union at Thomas Built when, in fact, the Union did not represent "an uncoerced majority of employees." (J.A. 29).

On March 17, 2005, the NLRB, the Union, and Freightliner settled the unfair labor practice charges filed by General Counsel for the NLRB. The terms of the settlement agreement included that: (1) Freightliner and the Union would cease giving effect to the Preconditions Agreement at all Freightliner facilities; (2) Freightliner would cease assisting the Union with the solicitation of union authorization cards from employees at Thomas Built; and (3) Freightliner would not recognize the Union at Thomas Built unless the Union was "certified by the NLRB." (J.A. 30).

B

On January 24, 2006, four employees of Gastonia and one employee of Cleveland Truck filed this class action against Freightliner and the Union in the United States District Court for the Western District of North Carolina. The complaint alleged four claims

under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. The racketeering activity alleged in each of the four counts consists of violations of § 302 of the LMRA.[2] According to the complaint, Freightliner violated § 302 when it: (1) required some of its employees to attend on paid company time Union presentations explaining the Card Check Agreement; (2) provided the Union reasonable access to nonwork areas in company plants to allow Union representatives to meet with employees; and (3) agreed to refrain from making negative comments about the Union during the organizing campaigns. The complaint also alleges that the Union violated § 302 when it agreed to receive these alleged benefits. The five employees (the Employees), for themselves and a proposed class of Freightliner employees, sought damages for the wages, benefits, and other terms of employment for which they allegedly were deprived as a result of the alleged racketeering activity. The Employees also sought damages for the dues that Freightliner's employees paid to the Union because they allegedly never received loyal collective bargaining representation. Finally, the Employees sought treble damages under 18 U.S.C. § 1964(c).

On November 9, 2006, the district court dismissed the complaint for failure to properly allege a § 302 violation. *See* Fed. R. Civ. P. 12(b)(6). According to the district court, the complaint did not set forth allegations demonstrating that Freightliner delivered "'things of value'" to the Union. (J.A. 62). The Employees noted this timely appeal.

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[2] A violation of § 302 is one of the enumerated predicate racketeering activities in the RICO statute. 18 U.S.C. § 1961(1)(c).

II

The Employees contend that the district court erred when it determined that their complaint did not properly allege a § 302 violation. Our review of the district court's Rule 12(b)(6) dismissal is *de novo*. *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991). In conducting this review, we construe the factual allegations of the complaint "in the light most favorable to plaintiff." *Battlefield Builders, Inc. v. Swango*, 743 F.2d 1060, 1062 (4th Cir. 1984). However, we are not bound by the legal conclusions drawn in the complaint. Dist. 28, *United Mine Workers of Am., Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085-86 (4th Cir. 1979). To survive a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007), and the complaint must have "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

With certain exceptions not applicable in this case, § 302 of the LMRA prohibits, among other things, an employer from "pay[ing], lend[ing], or deliver[ing], or agree[ing] to pay, lend, or deliver, any money or other thing of value" to a labor union or a representative of such union. 29 U.S.C. § 186(a). With these same inapplicable exceptions, the statute also prohibits a labor union or union representative from receiving or accepting "any money or other thing of value" from an employer. *Id.* § 186(b). According to the Employees, Freightliner delivered "thing[s] of value" to the Union when it agreed to: (1) require some of its employees to attend, on paid company time, Union presentations explaining the Card Check Agreement; (2) provide the Union reasonable access to non-work areas in

company plants to allow Union representatives to meet with employees; and (3) refrain from making negative comments about the Union during the organizing campaigns. As the Employees' argument goes, because these concessions made by Freightliner benefited the Union's organizing efforts, they were "thing[s] of value" under § 302, because a "thing of value" means anything that has subjective value to the Union.

We agree with the district court that Freightliner did not deliver "thing[s] of value" to the Union, as the phrase "thing[s] of value" is used in § 302. First, the plain language of the statute does not support the Employees' position. In determining the meaning of a statute, we examine the statute's plain language. *United Seniors Ass'n, Inc. v. Social Sec. Admin.*, 423 F.3d 397, 402 (4th Cir. 2005). In doing so, we look at "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Under the plain language of the statute, the concessions made by Freightliner in the Card Check Agreement do not involve the payment or delivery of a "thing of value." The concessions provided by Freightliner all involve permitting the Union access to employees during an organizing campaign. Such concessions do not involve the delivery of either tangible or intangible items to the Union. A vacuum salesman who is permitted by a company to make a sales pitch to employees does not receive a thing of value from the company. So, too, is the case of a company that allows a union access to its employees during an organizing campaign. In such situations, no "thing[s] of value" are delivered by the company.

Rather, all that is involved is the establishment of mutually acceptable ground rules, for the sales pitch in the case of the vacuum salesman, and the organizing campaign in the case of the union.

Our reading of the statute is consistent with the purposes of § 302. The Supreme Court has noted that § 302 was enacted to curb abuses that Congress felt were "inimical to the integrity of the collective bargaining process." *Arroyo v. United States*, 359 U.S. 419, 425 (1959). In particular, Congress was "concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Id.* at 425-26 (footnotes omitted); *see also Turner v. Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979) ("The dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers."). Thus, § 302 is aimed at preventing "bribery, extortion and other corrupt practices conducted in secret." *Caterpillar, Inc. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 107 F.3d 1052, 1057 (3d Cir. 1997) (en banc).

In this case, the concessions made by Freightliner do not involve bribery or other corrupt practices. By no stretch of the imagination are the concessions a means of bribing representatives of the Union; indeed, no representative of the Union personally benefited from these concessions. Rather, the concessions serve the interests of both Freightliner and the Union, as they eliminate the potential for hostile orga-

nizing campaigns in the workplace. In this sense, the concessions certainly are not inimical to the collective bargaining process.

Our interpretation of the phrase "thing of value" also is buttressed by § 302's penalty provision. Under § 302's penalty provision, the severity of the sentence is dictated by the monetary value of the thing delivered by the employer or received by the union. A person who willfully violates § 302 is guilty of a felony unless the value of the money or thing involved does not exceed $1,000, in which case the person is guilty of a misdemeanor. Thus, Congress clearly intended § 302's "thing of value" to have at least some ascertainable value. In this case, unquestionably, the concessions made by Freightliner, which simply involved allowing the Union access to Freightliner's employees, have no such whatsoever.[3]

We also note that our reading of § 302 is consistent with a decision on similar facts from the Third Circuit. In *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, (3d Cir. 2006), an employer and a labor union signed an agreement which contained a series of provisions, including one that provided for a card check procedure, whereby the union would present cards requesting union representation signed by a majority of the employer's employees and the employer would provide a current list of employees and valid signature samples. *Id.* at 209. One of the arguments raised on appeal by the employer was that the agreement

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[3] Because the concessions made by Freightliner have no ascertainable value, we need not decide the extent to which intangible items may have value under § 302 or any other criminal statute prohibiting the delivery, conveyance, or acceptance of a "thing of value."

was void because it required the employer to deliver "thing[s] of value" to the union in violation of § 302. *Id.* at 218. In rejecting this argument, the court noted:

> Not surprisingly, Sage is unable to provide any legal support for the remarkable assertion that entering into a valid labor agreement governing recognition of a labor union amounts to illegal labor bribery. There are many reasons why this argument makes no sense, including the language of section 302 itself, which proscribes agreements to "pay, lend, or deliver . . . any money or other thing of value." The agreement here involves no payment, loan, or delivery of anything. The fact that a Neutrality Agreement—like any other labor arbitration agreement—benefits both parties with efficiency and cost saving does not transform it into a payment or delivery of some benefit. Furthermore, any benefit to the union inherent in a more efficient resolution of recognition disputes does not constitute a "thing of value" within the meaning of the statute.

Id. at 219. We agree with the Third Circuit that an agreement setting forth ground rules to keep an organizing campaign peaceful does not involve the delivery of a "thing of value" to a union.

The Employees' real beef in this case seems to be with the concessions made by the Union in the Preconditions Agreement. However, the Union's concessions in the Preconditions Agreement do not bring § 302 into play, because § 302 only prevents employers from delivering (and the union or union representatives from accepting or receiving) "thing[s] of value." Pursuant to the Preconditions Agreement, Freightliner

did not deliver anything to the Union, and the Union did not extort anything.

With that said, it is important to note that adequate remedies under the NLRA are available to employees, allowing them to challenge agreements similar to the two agreements in this case, though the available remedies do not include the treble damages that are available under RICO. Sections 8(a)(2) and 8(b)(1)(A) of the NLRA, 29 U.S.C. §§ 158(a)(2) and (b)(1)(A), prohibit, in certain circumstances, the negotiation of a CBA establishing wages, fringe benefits, and other terms and conditions of employment before the union receives the support of a majority of bargaining unit employees. The NLRA also separately prohibits employers from improperly coercing employees with regard to their right to choose or reject union representation. *See Id.* §§ 158(a)(1) and (2).[4] In

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[4] The NLRB, as well as this court, has held that allowing unions to address employees on company property and company time does not, without some further evidence of coercion, violate the NLRA. *See Tecumseh Corrugated Box Co.*, 333 NLRB 1, 6 (2001) ("As to Tecumseh's conduct in allowing the Teamsters to address its employees on company time and property, the Board has long held that such conduct, without more, does not amount to unlawful assistance within the meaning of section 8(a)(2) of the Act."); *Longchamps, Inc.*, 205 NLRB 1025, 1031 (1973) ("[T]he use of company time and property does not, *per se*, establish unlawful employer support and assistance."); *see also Kimbrell v. NLRB*, 290 F.2d 799, 802 (4th Cir. 1961) ("The petitioners stress particularly the circumstances that the employer gave permission to the union to address the employees during working hours, for which the employees were paid, and that the employer accepted the card check without a formal election as evidence of the majority choice of the union and speedily negotiated a union contract. These are of course circumstances to be taken into account in making an ultimate finding but they are not conclusive, for it has been frequently held that they do not constitute per se violations of the statute in the absence of coer-

this case, unfair labor practice charges containing such allegations concerning Thomas Built were, in fact, filed against Freightliner and the Union and were settled to the satisfaction of the NLRB. The availability of such adequate remedies severely undermines the Employees' attempt to stretch § 302 beyond its limits. We simply cannot apply § 302 in a manner inconsistent with both the statute's plain language and Congress' intent in passing the statute.

III

For the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED

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cion, interference or restraint."). The fact intensive inquiry conducted by the NLRB to resolve access issues under the NLRA can lead to different results depending on the circumstances presented. *Compare Vernitron Elec. Components, Inc.*, 221 NLRB 464, 465 (1975) (finding access amounted to unlawful assistance) with Tecumseh Corrugated Box Co., 333 NLRB at 6 (dismissing complaint alleging improper access).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:06CV32

RONNIE ADCOCK, TIMOTHY COCHRANE, THOMAS COCHRANE, KATHERINE IVEY, AND KRISTI JONES
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AND FREIGHTLINER LLC
Defendants.

THIS MATTER is before this Court upon Defendant's "Motion to Dismiss" (Document #5). Defendant contends that Plaintiffs claim should be dismissed for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. BACKGROUND

Plaintiffs allege that in August 2002, Freightliner LLC, ("Freightliner") and the International Union United Automobile and Agricultural Implement Workers of America ("UAW") (together, the "Defendants") conspired to create a quid pro quo system where the UAW offered to make bargaining concessions in exchange for Freightliner giving the UAW special privileges in violation of 18 U.S.C. § 1962, the Racketeer Influenced and Corrupt Organizations Act. Those privileges included access to employees during the work day through mandatory meetings and in

common areas such as the breakroom. In addition, Freightliner agreed not to make any negative comments about the UAW. These concessions were part of a "card check agreement" between Freightliner and the UAW.

II. DISCUSSION

A motion to dismiss for failure to state a claim upon which relief may be granted should be allowed if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief. *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 655 (4th Cir 2004). A motion to dismiss should be granted if the complaint itself fails to allege the elements for a cause of action or facts sufficient to support such elements. *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir.), *cert. denied*, 540 U.S. 940 (2003). Moreover, "allegations must be stated in terms that are neither vague nor conclusory." *Estate Constr. Co. v. Miller & Smith holding Co.*, 14 F.3d 213, 220 (4th Cir. 1994).

18 U.S.C. § 1962(b) requires 1) a person 2) through a pattern of racketeering activity 3) acquired or maintained, directly or indirectly, any interest in or control of 4) any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. *See* 18 U.S.C. § 1962(b). 18 U.S.C. § 1962(c) requires a Plaintiff to plead "1) conduct, 2) of an enterprise 3) through a pattern 4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex*, 473 U.S. 479, 496 (1997); *Davis v. Hudgins*, 896 F. Supp. 561, 567 (E.D. Va. 1995). But as a threshold showing to both 18 U.S.C. § 1962(b) and (c), a Plaintiff must plead

that a Defendant committed one of the crimes enumerated in 18 U.S.C. § 1961(l). *Synergy Fin., L.L.C. v. Zarro*, 329 F. Supp. 2d 701, 712 (W.D.N.C. 2004) quoting *Central Distribs. of Beer, Inc. v. Conn.*, 5 F.3d 181, 183-84 (6th Cir. 1993).

In this case, Plaintiffs allege one instance of racketeering activity, a violation of § 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186.

Under § 302, employers cannot deliver "money or other thing of value" to labor organizations. Labor organizations are also prohibited from requesting or receiving anything of value. In order to survive a motion to dismiss, Plaintiffs must identify facts that support the allegations that a) any "thing of value" passed between the UAW and Freightliner; and b) there was a pattern of violations sufficient to sustain a RICO claim.

In this case, there is no evidence that "things of value" were improperly exchanged between the UAW and Freightliner. Participation of unions and employers in card check programs is proper and has never held to be illegal. *See Hotel Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992), *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3rd Cir. 2004) . If the Court were to find that participation in cardcheck agreements was illegal, it would have the effect of criminalizing all collective bargaining agreements. Since the Plaintiffs pleadings do not allege a felony, the pleadings fail to fulfill the necessary requirements for § 302. 18 U.S.C. § 1962 cannot apply without an underlying felony. In this case, it is inconceivable that Freightliner and the UAW's participation in the cardcheck agreement was

a felony. Accordingly, the Defendants' Motion to Dismiss is hereby GRANTED.

IT IS SO ORDERED.

Signed: November 9, 2006

/s/ Graham C. Mullen
Graham C. Mullen

APPENDIX C

[Filed: January 22, 2009]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-2287
(3:06-cv-00032)

RONNIE ADCOCK; TIMOTHY COCHRANE; THOMAS COCHRANE; KATHERINE IVEY; KRISTI JONES
Plaintiffs-Appellants

v.

FREIGHTLINER LLC; INTERNATIONAL UNION, UNITED AUTOMOBILE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA
Defendants-Appellees

NATIONAL LABOR RELATIONS BOARD,
Amicus Curiae

ORDER

The petition for rehearing *en banc* was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

Sam Date: September 17, 2004

To: Willie L. Clark, Jr., Regional Director
Region 11

From : Barry J. Kearney, Associate General Counsel
Division of Advice

Subject: Thomas Built Buses, Inc., a subsidiary
of Freightliner, LLC
Case 11-CA-20038

518-5084-5033
518-5084-5050

International Union, United Automobile
and Agricultural Implement Workers
of America (UAW)
Case 11-CB-3455

530-6050-7000
530-8045-3500
536-2563
536-2570
596-0420-5000

The Region submitted these cases for advice as to whether Thomas Built Buses (TBB) and the Union violated Section 8 (a) (2) and Section 8 (b) (1) (A) of the Act, respectively, by negotiating and entering an agreement, which TBB insisted on as a condition precedent to agreeing to a card check procedure at certain of its manufacturing facilities, that established terms and conditions of employment for employees whom the Union did not yet represent. We

conclude that TBB and the Union engaged in unlawful pre-recognition bargaining under the principles set forth in *Majestic Weaving Co.*[1]

FACTS

A. History of the Parties' Card Check Recognition Procedure

Freightliner, LLC, a wholly owned subsidiary of DaimlerChrysler AG, has several commercial vehicle manufacturing plants throughout the country. In 1990, the Union[2] won a Board election at the Freightliner plant in Mt. Holly, North Carolina and was certified to represent Freightliner's production and maintenance employees at that facility. Freightliner and the Union have entered into successive collective bargaining agreements covering that facility, with the most recent having a term of June 2003 to June 2006.

In January 2000, DaimlerChrysler and the Union entered a neutrality agreement in which DaimlerChrysler pledged to remain neutral during Union organizing campaigns at its facilities. Based on that neutrality agreement,

Freightliner and the Union began to discuss applying a card check recognition procedure to Freightliner plants. During these discussions, Freightliner insisted that the Union agree to certain "preconditions" that would apply to any of the plants at which the Union would invoke the card check procedure. In August 2002, the parties engaged in nego-

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[1] 147 NLRB 859, 860-861 (1964), *enf. denied* on other grounds 355 F.2d 854 (2d Cir. 1966).

[2] International Union, United Automobile and Agricultural Implement Workers of America (UAW).

tiations over those preconditions. In a letter dated around the same time, Freightliner stated that it would not agree to a card check recognition procedure for its plants unless the Union agreed to "contractual relief" over existing terms at the Mt. Holly plant.

In December 2002, Freightliner and the Union executed two interrelated agreements establishing a card check procedure by which Freightliner, and its subsidiaries, could voluntarily recognize the Union as the exclusive bargaining representative for the unit employees at different plants. In the "Agreement on Preconditions to a Card Check Procedure Between Freightliner LLC and the [Union]" (the "precondition agreement"), the Union agreed to restrict bargaining over certain terms and conditions of employment in exchange for Freightliner's agreement to enter into a card check recognition procedure. The precondition agreement provides, in relevant part:

> The following commitment is given by the [Union] in exchange for Freightliner's Agreement to enter into a card check recognition procedure which could require Freightliner to voluntarily recognize the [Union] as exclusive representative of Production and Maintenance employees at certain Manufacturing Plants. Unless otherwise agreed to in advance by the Parties, this commitment shall remain in effect for a period of no less than five (5) years.
>
> * * *
>
> 2. There shall be no guaranteed employment or transfer rights between Business Units or Plants.
>
> 3. There will be no provisions for severance pay or SUB in the event of a layoff or plant closure.

4. There will be no strikes during the term of any collectively bargained agreement. The standard language will be identical to that contained in the Mt. Holly Labor Agreement.

* * *

6. There will be no subcontracting prohibitions, provided economies reflect noncompetitiveness. To the extent required, however, management will share economic and noncompetitive conditions with the Union before outsourcing or subcontracting.

* * *

8. There shall be no additional restrictions imposed against overtime scheduling.

* * *

10. Future benefits cost increases, in excess of normal inflation, will be shared between the Company and the employees proportionately at a rate to be determined between the Company and its employees.

* * *

12. In consideration of Freightliner's financial turnaround objectives, there will be no wage adjustments provided at any newly organized manufacturing plant prior to mid-2003.

The parties also executed a "Tentative Agreement by and Between Freightliner LLC and UAW for the Purpose of Establishing a Card Check Procedure" (the "card check procedure") establishing the card check procedure the parties would follow at a plant where the Union sought recognition. Among other things, this agreement stated that the organizing

campaign would be limited to two weeks, that the parties would jointly conduct a compulsory initial information meeting to explain the card check procedure to employees, that Freightliner would recognize the Union upon verification by a neutral that the Union obtained signed authorization cards from "50% + 1" of the unit, and that upon recognition Freightliner would bargain with the Union subject to the precondition agreement.

The Union invoked the December 2002 card check agreement at Freightliner's Gastonia and Cleveland, North Carolina manufacturing plants. In late January 2003, after the Union demonstrated its majority status in each unit through a card check, Freightliner voluntarily recognized the Union as the exclusive bargaining representative for separate units at those plants. Freightliner and the Union then negotiated initial contracts for each plant with a term of December 2003 to March 2007.

B. The Union Gains Recognition at Freightliner's Thomas Built Buses Plant

Thomas Built Buses (TBB) is a wholly owned subsidiary of Freightliner and is located in High Point, North Carolina. TBB, which employs about 1,150 production and maintenance employees, manufactures school and commercial buses in a plant comprised of nine separate buildings.

In February 2003, the Union began an organizing campaign at TBB. Although the Union and several unit employees filed unfair labor practice charges against TBB for its conduct during the organizing campaign, those allegations were all settled prior to litigation.

On February 6, 2004,[3] the Union asked Freightliner to apply the December 2002 card check recognition procedure to TBB. Freightliner agreed. On February 18, Freightliner provided the Union with a list that included the names, addresses, work departments, but not the telephone numbers, of TBB's production and maintenance employees. On February 24, TBB sent the employees a letter informing them of the card check procedure and that they would be paid to attend one of several mandatory meetings about that process on March 4. At the Union's request, TBB included a second notice about the card check process in the employees' March 2 paychecks.

On March 4, Freightliner/TBB and the Union held a series of joint captive audience meetings throughout the day with rotating groups of TBB's production and maintenance employees. Employees were required to attend and one employee was prevented by Rick Klinedinst, TBB's Vice-President of Human Resources, from leaving the meeting for his group. Both the Union and Freightliner/TBB were represented by several officials at each of the meetings.[4]

The meetings all followed the same general format: John O'Leary, TBB's president, convened each meeting and explained that Freightliner/TBB had decided that it would voluntarily recognize the Union if

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[3] All subsequent dates are in 2004 unless otherwise indicated.

[4] Freightliner/TBB was represented by Scott Evitt, Freightliner's Human Resources General Manager, Mike Heller, Freightliner's Labor Relations Manager, Mark Dolan, Freightliner's Labor Relations Specialist, John O'Leary, TBB's President, and Klinedinst. The Union was represented by Bob King, Vice-President of Organizing, Gary Casteel, Director for Region 8, and David McAlister, Administrative Assistant to Union Vice-President Nate Gooden.

the Union could demonstrate majority support through a card check. After telling the assembled employees that it did not matter to Freightliner/TBB whether or not the employees chose to have Union representation, O'Leary turned the podium over to the Union officials who then spoke in favor of the Union and urged the employees to sign authorization cards. As the different Union officials spoke and while the Freightliner/TBB officials remained in the room, approximately 30 to 35 Union organizers in red Union shirts circulated among the assembled employees handing out authorization cards for signatures and then collecting the signed cards from employees.

In the two weeks following March 4, Freightliner/TBB provided Union organizers with access to designated break areas during break times. Various TBB officials, including Vice President Klinedinst, escorted the Union organizers to the break areas and then left. On two occasions, Dave Bortz, one of the Union organizers, asked Klinedinst to remain in the break area to discuss scheduling matters. On these occasions, Union organizers continued to solicit cards from employees.

At the Union's request, the parties conducted a second series of mandatory, captive audience meetings on March 16. In general, the same Freightliner/TBB and Union officials who were present on March 4 were present for these meetings. Again, the meetings followed the same format, with Union organizers in red shirts circulating among the assembled employees, soliciting signed authorization cards as the Union officials spoke and while the Freightliner/TBB officials remained in the room.

The two-week period for the organizing campaign ended on March 18 when the parties convened in Charlotte, North Carolina for the card check. The Union presented the signed authorization cards it had solicited and TBB submitted an Excelsior list and copies of the employees' W-4 Forms to the neutral third party. That night, the neutral third party declared that the Union had demonstrated majority support.[5]

On March 22, Freightliner/TBB extended formal recognition to the Union as the exclusive bargaining representative for the production and maintenance employees at the High Point plant.

On April 14, the Charging Party filed these charges against Freightliner/TBB and the Union containing several allegations in connection with the parties' conduct during the two-week organizing period.[6] The Region dismissed some of the allegations, but is prepared to issue complaint alleging that TBB's grant of access to the Union and the captive audience meetings violated Section 8(a)(1) and (2) and 8 (b) (1) (A) and (2) the Act. Based on these findings, the Region has also concluded that Freightliner/TBB's recognition of the Union on March 22 was unlawful because it was tainted by the unlawful access and captive audience meetings.

Charging Party Ward asserts he was not aware of the precondition agreement when he originally filed these charges. The Region originally learned of the

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[5] The Union obtained 578 signed cards from 1,148 production and maintenance employees at TBB. Thus, the Union obtained cards from "50% plus 4" of the unit employees.

[6] The Charging Party is represented by the National Right to Work Foundation.

agreement when processing the charges concerning the organizing campaign that started in February 2003. After the Region informed him of the December 2002 precondition agreement, the Charging Party amended his charge on May 18 to allege that Freightliner/TBB and the Union violated the Act by negotiating an agreement regarding terms and conditions of employment at a time when the Union was not the employees' exclusive bargaining representative.

The parties have suspended negotiations for a collective-bargaining agreement covering the TBB employees at High Point pending resolution of these unfair labor practice charges.

ACTION

We conclude that Freightliner/TBB and the Union engaged in unlawful pre-recognition bargaining under the principles set forth in Majestic Weaving Co. Accordingly, the Region should allege in its complaint, absent settlement, that Freightliner/TBB and the Union violated Section 8(a)(2) and Section 8(b)(1)(A), by agreeing to apply the precondition agreement to TBB employees at a time when the Union was not the majority representative.

A. Freightliner/TBB and the Union Violated the Act By Negotiating the Precondition Agreement At a Time When the Union Was Not the Majority Representative.

Section 9(a) of the Act establishes that the exclusive bargaining representative for a unit of employees must be selected by a majority of those employees.[7]

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[7] *See, e.g., International Ladies' Garment Workers' Union (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731, 737 (1961).

At the same time, Section 7 assures employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity.[8] "There could be no clearer abridgment of Section 7 of the Act" than when an employer grants exclusive bargaining status to a union selected by only a minority of its employees.[9] Thus, when an employer recognizes and negotiates a collective-bargaining agreement with a union that has not achieved majority status among its employees, that employer unlawfully supports that union in violation of Section 8 (a) (2) and the union violates Section 8 (b) (1) (A) by accepting that support.[10]

In *Majestic Weaving*, the Board applied these principles to find that an employer and union violated the Act by negotiating an agreement before the union was the majority representative, even though the execution of the contract was conditioned upon obtaining majority support from the employer's employees. In that case, the union first requested recognition and bargaining at a time when it did not have any employee support.[11] The employer stated that it was willing to engage in negotiations so long as the union could show at the "conclusion" that it represented a majority of the unit employees.[12] The parties reached agreement and, prior to executing the contract, the union presented the employer with cards signed by

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[8] *Id.*

[9] *Id. See also Majestic Weaving Co.*, 147 NLRB at 860.

[10] *See Bernhard-Altmann*, 366 U.S. at 737-738; *Crossett Co.*, 140 NLRB 667, 669 (1963).

[11] *See Majestic Weaving*, 147 NLRB at 866.

[12] *Id.* at 860, 866.

26 of 37 unit employees.[13] The Board held that the employer unlawfully supported the union in violation of Section 8(a)(2) by negotiating a contract at a time when the union did not represent a consenting majority of the unit employees.[14] The Board found it "immaterial" that the parties had conditioned the actual signing of the contract on the union's obtaining majority support from the employees.[15]

The rule of Majestic Weaving dictates finding the parties' conduct unlawful here where the facts are very similar. Freightliner and the Union negotiated the terms of the precondition agreement around August 2002 and then signed it in December 2002. In February 2004, the parties agreed to apply their card check recognition procedure to TBB. The card check recognition procedure specifically included by reference the precondition agreement.[16] Thus, when the parties agreed to apply their card check procedure to the TBB employees, they also agreed that the terms and conditions of employment embodied in the precondition agreement would apply to that unit upon the Union obtaining majority status. Since the Union did not represent a majority of the production and

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[13] *Id.* at 867.

[14] *Id.* at 860. The absence of a Section 8 (b) (1) (A) charge against the union in Majestic Weaving precluded the Board from finding that violation.

[15] *Id.* The Board also found that the card majority was tainted by unlawful assistance because an agent of the employer solicited the cards. 147 NLRB at 859-860. The Board did not rely on that taint in its discussion of the pre-majority recognition.

[16] Paragraph 4 of the card check agreement states, "If the card check verifies majority support, Freightliner will extend recognition voluntarily to the UAW without an NLRB election and will engage in good faith collective bargaining subject to the attached preconditions." (Emphasis added.)

maintenance employees at TBB when the parties agreed to the application of the precondition agreement to the TBB employees, the parties violated Section 8 (a) (2) and 8 (b) (1) (A) of the Act. As in *Majestic Weaving*, it is immaterial that the parties would not apply the precondition terms until the Union obtained majority support through the card check procedure.[17]

B. The Precondition Agreement Is Not Legitimized by the Kroger Rationale.

An exception to the *Majestic Weaving* rule involves "after-acquired" or "additional stores" clauses negotiated by an employer and a Section 9(a) union. In *Kroger Co.*, the employer violated Section 8(a)(5) by breaching a contract clause that would have added additional stores to the bargaining unit covered by the parties' contract if the union obtained a showing of majority status at those facilities.[18] The Board interpreted the clause as a waiver of the employer's right to demand an election at the new stores. The

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[17] *See Majestic Weaving Co.*, 147 NLRB at 860-861; *Crossett Co.*, 140 NLRB at 669. The relevant unfair labor practices occurred here even if the unit employees did not have knowledge of the precondition agreement when they signed their cards. The Board found a Section 8(a)(2) violation in *Majestic Weaving* despite the lack of evidence showing that the employees who signed cards were aware of the prior oral recognition the employer had extended to the union. *See* 147 NLRB at 860, 866-867, 873-874.

Moreover, apart from the other forms of unlawful support that tainted the recognition, the Region should also allege that the March 22 recognition was tainted by the unlawful negotiations over the precondition agreement.

[18] 219 NLRB at 388-389. *See also Retail Clerks Local 870 (White Front Stores, Inc.)*, 192 NLRB 240 (1971).

Board has subsequently held that the *Kroger* decision implicitly found that such after-acquired clauses, which contemplate the absorption of employees into an existing multi-location unit, are mandatory subjects of bargaining.[19]

On the other hand, bargaining subjects involving employees outside the bargaining unit are considered mandatory subjects only if they "vitally affect" unit employees' terms and conditions of employment.[20] Application-of-contract clauses that extend a collective-bargaining agreement to employees who would remain outside the existing unit must satisfy the "vitally affects" test to be considered mandatory bargaining subjects. Thus, in *Lone Star Steel Co.*, the Board applied the "vitally affects" test to an application- of-contract clause pertaining to non-unit employees, finding it was a mandatory bargaining subject because it protected "the jobs and work standards of bargaining unit employees . . . by removing economic incentives which might otherwise encourage [the employer] to transfer such work to other mines under its control."[21] On review, the 10th Cir-

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[19] *Pall Biomedical Products Corp.*, 331 NLRB 1674, 1675 (2000), *enf. denied on other grounds* 275 F.3d 116 (D.C. Cir. 2002); *Mine Workers (Lone Star Steel Co.)*, 231 NLRB 573, 576 (1977), *enf. denied* on other grounds 639 F.2d 545 (10th Cir. 1981), *cert. denied* 450 U.S. 911 (1981). *See generally Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 188 (1971) ("remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract . . ., not in an unfair-labor-practice proceeding").

[20] *See generally Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. at 179; *Teamsters v. Oliver*, 358 U.S. 283, 294 (1959).

[21] 231 NLRB 573, 576 (1977), *enf. denied* in relevant part 639 F.2d 545 (10th Cir. 1980), *cert. denied* 450 U.S. 911 (1981).

cuit agreed that the "vitally affects" test governed, but denied enforcement on the ground that the Board misapplied the test. Thus, the Lone Star Steel court found the application-of-contract provision overly broad in that it did not directly attack the specific problem that was perceived as threatening bargaining unit interests.[22] The court illustrated the provision's overbreadth by noting that the provision would extend the entire contract, including noneconomic provisions, to all of the employer's locations, even where no unit work was performed, having "no bearing on the unit employees."[23] The *Lone Star Steel* court thus recognized the following dichotomy: if an application-of-contract clause extending a CBA to employees who will remain outside the existing unit nonetheless serves "unit interests," it will be considered a mandatory bargaining subject; on the other hand, the clause will not be a mandatory subject if it merely represents a "disguised purpose to further the union's institutional or organizational interests."[24]

Although *Kroger* and *Lone Star Steel* involve 8(a)(5) or 8(b)(3) refusal to bargain allegations, we would consider applying the mandatory/nonmandatory

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[22] *Lone Star Steel Co. v. NLRB*, 639 F.2d at 557-558.

[23] *Id.* at 558.

[24] *Lone Star Steel Co. v. NLRB*, 639 F.2d at 557. *Cf. Pall Corp. v. NLRB*, 275 F.3d 116, 122, 123 (D.C. Cir. 2002), *denying enf.* 331 NLRB 1674 (2000) (agreement providing for CBA to extend to employees performing unit work in new employer facility is "direct frontal attack" upon issue of work being transferred out of unit; on the other hand, agreement merely extending recognition to new employer facility is, at most, a way of expediting recognition of union, and whether union would eventually negotiate CBA that would equalize labor costs is too speculative to be considered a "direct frontal attack").

analysis in cases involving Section 8 (a) (2) and 8 (b) (1) (A) cases involving application of contract provisions like the precondition agreement at issue here. The same analysis may be relevant because the Board presumably would not require compliance with a contract provision as a mandatory subject of bargaining if compliance would violate Sections 8 (a) (2) or 8 (b) (1) (A) . Put another way, the Board has not yet addressed the legality, under Sections 8(a)(2) and 8(b)(1)(A), of an application-of-contract clause that does not satisfy the "vitally affects" standard.

However, even that analysis based on Kroger would not privilege the precondition agreement here because the Union clearly did not enter it to serve the "unit interests" of employees it already represented. The Union obtained Freightliner/TBB's agreement to voluntary recognition based on a card check only after the Union first agreed to "contract relief"—or concessions—at the one facility it already represented (Mt. Holly), and restrictions on bargaining over terms and conditions of employment at the facilities it hoped to represent in the future. These facts show that the Union did not enter the precondition agreement to serve the "unit interests" of employees it already represented, but entered the agreement to further its own organizational interests. Accordingly, this is not a case where the rationale of Kroger and its progeny would legitimize the parties' pre-majority conduct.

C. The Union's Defenses Are Without Merit.

The Union attempts to distinguish this case from Majestic Weaving by arguing that here, the precondition agreement sets forth "vague and indefinite" terms that are only an "outline of a process for future agreements" rather than a complete, enforceable

collective-bargaining agreement. We agree with the Region that this argument is without merit.

Contrary to the Union's assertion, a review of the terms embodied in the precondition agreement show that the parties were involved in exactly the kind of bargaining over mandatory subjects that the Act reserves for majority representatives. This precondition agreement is unlike lawful neutrality agreements that merely settle procedures for resolving questions concerning representation and do not establish terms and conditions of employment.[25] Thus, in exchange for Freightliner agreeing to submit to a card check recognition procedure at certain of its plants, the Union agreed on concessions that sacrificed for five years the right of future represented employees to strike, and guaranteed collective bargaining agreements with terms and conditions of employment that appear designed to protect Freightliner's business interests at the expense of employee interests. For example, the Union agreed in advance to no guaranteed employment or transfer rights, no severance pay, no additional restrictions against overtime, no prohibition on subcontracting, and the proportionate sharing of healthcare cost increases with employees. These are not "vague and indefinite" terms, but are mandatory subjects contained in an agreement between the parties that may be enforced under Section 301 of the Act. It is therefore irrelevant that the parties did not negotiate an entire collective-bargaining agreement,

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[25] *See, e.g., Hotel & Restaurant Employees Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 566 (2d Cir. 1993); *Hotel & Restaurant Employees Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1469-70 (9th Cir. 1992); *New Otani Hotel & Garden*, 331 NLRB 1078, 1082 (2000).

as long as the parties did negotiate specific, enforceable terms and conditions of employment.[26]

The Union also asserts that Section 10(b) bars any allegations concerning the December 2002 precondition agreement. The Union claims that because the Charging Party amended the charge on May 18, 2004[27] to add the unlawful pre-recognition bargaining allegation, the precondition agreement is well outside the six-month limit in Section 10(b) because it was entered in December 2002. The Union further asserts that the unit employees at TBB learned of the precondition agreement by at least November 11, 2003, which is also outside the 10(b) limit, because on that date copies of the precondition agreement were allegedly distributed throughout Freightliner's plants.

The Union's Section 10(b) defense is also without merit. "The running of the limitations period can begin only when the unfair labor practice occurs. . . . [T]he 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act . . . [and] the burden of showing such . . . notice is on the party raising the affirmative defense of Section 10 (b)."[28] Here, regardless of the Union's reliance on the December 2002 and November 2003 dates, the Union did not commit an unfair labor practice regarding the TBB unit employees until the parties agreed that the precondition agreement would apply to that facility. The agreement itself did not state at

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[26] *Cf., e.g., Hotel & Restaurant Employees Local 217 v. J.P. Morgan Hotel*, 996 F.2d at 566 (finding neutrality/card check agreement enforceable under Section 301).

[27] The original charge was filed on April 14, 2004.

[28] *Leach Corp.*, 312 NLRB 990, 991 (1993), *enfd.* 54 F.3d 802 (D.C. Cir. 1995).

execution that it would apply to TBB, but only refers to "certain" Freightliner plants. Thus, there was no unfair labor practice involving TBB until February 2004 when the Union requested that Freightliner apply the card check recognition procedure to TBB. Only at that point, when the parties agreed that the card check procedure was in effect at TBB, would the precondition agreement apply to the TBB High Point plant.[29] Since February 2004 is well within the six-month limit of Section 10(b), the Union's argument must fail.

There is also no merit to the Union's alternative 10(b) argument. Contrary to the Union's assertion, there is no evidence that the Charging Party had clear and unequivocal notice of the precondition agreement by November 11, 2003. The Charging Party was not aware of the agreement until the Region, which had obtained the agreement while processing other charges, brought it to his attention in April or May 2004, well within the 10(b) limitation period. The Union relies on a copy of an anti-Union leaflet attacking the precondition agreement that was allegedly distributed to TBB employees around November 11, 2003. However, there is no evidence that the Charging Party or any other TBB employee saw this leaflet. The leaflet, which contains only a mark indicating that it was faxed to the UAW office on November 11, contains no reference to the TBB plant, nor is it specifically connected to the TBB employees in any manner. Thus, the Union did not satisfy its burden of proof for its 10(b) defense.

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[29] *See generally Industrial Power*, 321 NLRB 816, 816 (1996) (although employer stated on earlier date that it would terminate contract on specified date, 10(b) period was not triggered until actual repudiation); *Leach Corp.*, 312 NLRB at 991 and fn. 7.

In conclusion, the Region should include in its complaint, absent settlement, allegations that Freightliner/TBB and the Union violated Section 8(a)(2) and Section 8(b)(1)(A), respectively, by negotiating and entering into the precondition agreement at a time when the Union did not represent a majority of Freightliner/TBB's employees.

B.J.K.

APPENDIX E

Tenative Agreement By and Between
Freightliner LLC and UAW for the Purpose of
Establishing a Card Check Procedure

1. The UAW will designate the production and maintenance bargaining unit to be represented. Issues related to hourly employees not in production or maintenance will be resolved in advance by the Parties.

2. For purposes of determining the number of employees that constitute a majority of the bargaining unit, the employee population will be composed of only those employees on the Company's active payroll at the time the bargaining unit is designated.

3. The demonstration of majority support within the proposed appropriate bargaining unit shall be by a card check procedure as described below.

4. If the card check verifies majority support, Freightliner will extend recognition voluntarily to the UAW without an NLRB election and will engage in good faith collective bargaining subject to the attached preconditions.

5. "Majority" is defined as support for the UAW by 50% + 1 of the employees within the unit.

Card Check Procedure

A. Freightliner and the UAW will jointly develop a card that explicitly designates the UAW as the signer's bargaining representative at the specific location of the proposed unit. The employees printed name and full signature will be required.

B. Freightliner and the UAW will jointly present an initial information program that explains the card check procedure to employees. In advance of the meeting, a letter from Freightliner will be sent to all employees explaining the card check Agreement and process that will be used—including the date and time of meetings to be held in the Plant. Attendance at these meeting will be compulsory, with pay, during working hours. At the conclusion of the informational program, the designation cards will be distributed to the active employees of the designated bargaining unit.

C. Freightliner and the UAW will designate a Neutral whose duties shall be:

(1) Collect signed cards completed by the employees

(2) Validate signatures against the employee's W-4 form

(3) Confirm from a list provided by Freightliner that employees active at the time the bargaining unit was designated

(4) Count all valid cards and decide whether a 50% + 1 majority was reached

Card Check Procedure

D. During an organizing campaign, employee participation in on-site, mutually agreed upon UAW information meetings will, be voluntary and without pay.

E. Organization campaign shall begin on a mutually agreed upon date and shall end two weeks thereafter with a card count event conducted by the Neutral.

6. If a majority of 50% + 1 is not attained by the UAW as determined by the Neutral, the UAW agrees that it will not campaign again, at that location until 12 months have lapsed.

7. If employees from other Company locations are used to campaign, their absence from their normal job duties will be scheduled so as not to interfere with production at their home plant.

8. During organizing campaigns, the UAW will have reasonable access to the employees during the workday in non-work areas, including parking lots, building entrances and exits, break areas, smoking areas, cafeterias, and hallways.

9. The UAW agrees that it will make no public (written or verbal) negative comments about Freightliner or its management or its products. Management agrees that it will not make any negative comments (written or verbal) against the UAW.

10. During organizing campaigns, neither Freightliner nor the UAW will make any statements to the press unless the text of such press statements is jointly agreed upon in advance.

11. The provisions of the Daimler/Chrysler Neutrality Agreement will remain in effect.

12. During organizing campaigns, the UAW International and Local Union organizers will do their utmost to ensure there are no production interruptions related to the card check procedure.

Agreed:

Scott W. Evitt 12/11/02
For Freightliner LLC

Nate Gooden 12/16/02
For the UAW

APPENDIX F

Agreement on Preconditions to a
Card Check Procedure Between
Freightliner LLC and the UAW

The following commitment is given the UAW in exchange for Freightliner's Agreement to enter into a card check recognition procedure which could require Freightliner to voluntarily recognize the UAW as exclusive representative of Production and Maintenance employees at certain Manufacturing Plants. Unless otherwise agreed to in advance by the Parties, this commitment shall remain in effect for a period of no less than five (5) years.

1. There will be separate consideration in terms and conditions of employment for each Business Unit because of industry differences. (trucks, parts, busses, fire and rescue, chassis) including competitive wage and benefits packages within comparative product markets. Freightliner will provide proposals, as necessary,
2. There shall be no guaranteed employment or transfer rights between Business Units or Plants.
3. There will be no provisions for severance, pay or SUB in the event of a layoff or plant closure.
4. There will be no strikes during the term of any collectively bargained agreement. The standard language will be identical to that contained in the Mt. Holly Labor Agreement.
5. There are no future expectations that any Freightliner Business Unit will be required to meet "UAW pattern" Agreements.

6. There will be no subcontracting prohibitions, provided economies reflect non-competitiveness. To the extent required, however, management will share economic and non-competitive conditions with the Union before outsourcing or subcontracting.

7. All production standards, plant layout, and job qualifications shall remain at the Company's discretion.

8. There shall be no additional restrictions imposed against overtime scheduling.

9. There may be a maximum of one paid union representative per plant location with basic office space provided. Further, the Union will ensure that grievance handling and related contract administration activities by committee persons are expedited.

10. Future benefits cost increases, in excess of normal inflation, will be shared between the Company and the employees proportionately at a rate to be determined between the Company and its employees.

11. The UAW will not attempt to organize any of Freightliner's office or professional employees.

12. In consideration of Freightliner's financial turnaround objectives, there will be no wage adjustments provided at any newly organized manufacturing plant prior to mid-2003.

13. The UAW agrees that if will not require, or pressure, Freightliner or its Business Units to utilize suppliers strictly based upon their union representation status.

Agreed:

Scott W. Evitt 12/11/02
For Freightliner LLC

Nate Gooden 12/16/03
For the UAW

(3)

Supreme Court, U.S.
FILED
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No. 08-1319

IN THE

Supreme Court of the United States

RONNIE ADCOCK, *et al.*,
Petitioners,

v.

FREIGHTLINER LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

STEPHEN P. BERZON
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Counsel for Respondent United Automobile, Aerospace, and Agricultural Implement Workers of America

WILLIAM L. RIKARD, JR.
Counsel of Record
PARKER, POE, ADAMS & BERNSTEIN LLP
Three Wachovia Center
401 South Tryon Street
Suite 300
Charlotte, NC 28202
(704) 372-9000

Counsel for Respondent Freightliner, LLC

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Fourth Circuit Court of Appeals correctly held that Section 302 of the Labor Management Relations Act, 29 U.S.C. §186, does not criminalize an agreement between a labor union and an employer establishing mutually acceptable ground rules for organizing campaigns at the employer's facilities.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	5
I. The Fourth Circuit's Decision Is Consistent With All Other Cases Interpreting Section 302 of the LMRA and Does Not Conflict with Any Precedent From This Court	5
II. The Fourth Circuit Properly Rejected Petitioners' Proposed Expansion of Section 302 to Make Employers and Unions Criminally Liable for Entering Into Neutrality and Voluntary Recognition Agreements	11
CONCLUSION	17
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Page
Abuelhawa v. United States, 129 S. Ct. 2102 (2009)	10
Air Line Pilots v O'Neill, 499 U.S. 74 (1991)	16
Arizona Portland Cement Co., 302 N.L.R.B. 36 (1991)	14
Arroyo v. United States, 359 U.S. 419 (1959)	3, 12
Chamber of Commerce of U.S. v. Brown, 128 S. Ct. 2408 (2008)	8, 13
Hotel Employees, Rest. Employees Union, Local 2 v. Marriott Corp., 961 F.2d 1464 (9th Cir. 1992)	7
Hotel Employees and Rest. Employees Union v. Sage Hospitality Resources, 299 F. Supp. 2d 461 (W.D. Pa. 2003)	6
Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561 (2d Cir. 1993)	7
Hotel Employees Union, Local 57 v. Sage Hospitality Resources, LLC, 390 F.3d 206 (3d Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005)	*passim*
International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altman Texas Corp.), 366 U.S. 731 (1961)	16
Longchamps, Inc., 205 N.L.R.B. 1025 (1973)	16
MGM Grand Hotel, Inc., 329 N.L.R.B. 464 (1999)	13
Marquez v. Screen Actors Guild, 525 U.S. 33 (1998)	15

TABLE OF AUTHORITIES—Continued

Page

NLRB v. BASF Wyandotte, 798 F.2d 849 (5th Cir. 1986) 8, 9
NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941) 8
Patterson v. Heartland, 428 F. Supp. 2d 714 (N.D. Ohio 2006) 6
Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 10, 12
Rockwell Int'l Corp., 220 N.L.R.B. 1262 (1975) 8
United Mine Workers of America v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956) 8, 13
United Mine Workers (Lone Star Steel Co.), 231 N.L.R.B. 573 (1977), *enforced granted in relevant part and denied in other part*, 639 F.2d 545 (10th Cir. 1980) 15
United States v. Schiffman, 552 F.2d 1124 (5th Cir. 1997) 8, 9
Vaca v. Sipes, 386 U.S. 171 (1967) 15, 16
Verizon Information Systems, 335 N.L.R.B. 558 (2001) 8

STATUTES

18 U.S.C. §201 ..... 10, 11
18 U.S.C. §641 ..... 10, 11
18 U.S.C. §666 ..... 10, 11
18 U.S.C. §876 ..... 10, 11
18 U.S.C. §1954 ..... 10, 11
Labor Management Relations Act, 29 U.S.C. §186 ..... *passim*
National Labor Relations Act, 29 U.S.C. §158 ..... 8, 15, 16

TABLE OF AUTHORITIES—Continued

Page

Racketeer Influenced and Corrupt Practices Act, 18 U.S.C. §1962 ..... 1, 2, 3

IN THE

Supreme Court of the United States

No. 08-1319

RONNIE ADCOCK, *et al.*,
Petitioners,

v.

FREIGHTLINER LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

STATUTES INVOLVED

Petitioners sued for monetary damages under the Racketeer Influenced and Corrupt Practices Act ("RICO"), 18 U.S.C. §§1962(b), (c), and (d). Petitioners alleged violations of Section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §186, as the predicate acts for the alleged RICO liability. Petitioners neglected to include the criminal penalty provisions of Section 302(d), which are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

Petitioners, who are employees at two North Carolina facilities owned by Respondent Freightliner, LLC ("Freightliner") filed this lawsuit as a proposed class

action seeking treble damages against Freightliner and Respondent the United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW"). Petitioners alleged that by entering into and implementing an agreement establishing mutually agreeable ground rules for union organizing campaigns, Freightliner and the UAW engaged in a criminal conspiracy in violation of RICO, 18 U.S.C. §1962(b), (c), and (d).

Petitioners predicated their RICO claims on the allegation that three provisions of a neutrality and voluntary recognition agreement violated Section 302 of the Labor Management Relations Act, 29 U.S.C. §186, an anti-bribery statute that forbids an employer from "pay[ing], lend[ing], or deliver[ing] . . . any money or other thing of value" to a labor union. The three allegedly unlawful provisions are: 1) allowing UAW organizers "reasonable access to employees during the workday in non-work areas;" 2) providing that the UAW and Freightliner will conduct "an initial information meeting that explains the card check procedure to employees;" and 3) Freightliner's commitment that "it will not make any negative comments (written or verbal) against the UAW."[1]

The district court dismissed Petitioners' case for failure to state a claim, holding that the three challenged provisions did not violate Section 302. The district court cited the Third Circuit's holding that a similar organizing and recognition agreement was

---

[1] Petitioners' description of this provision as a "gag rule" that "eliminat[es] opposition to the union" is misleading. Pet. 15, 16, 18. Freightliner voluntarily chose not to exercise its right to speak out against a union during organizing; any of Freightliner's employees who opposed the union remained free to actively organize and campaign against the union.

not a "thing of value" made illegal by Section 302, *Hotel Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 219 (3d Cir. 2004), *cert. denied* 544 U.S. 1010 (2005), and concluded that "it is inconceivable that Freightliner and the UAW's participation in [the agreement] was a felony." Pet. App. 17a-18a. Because the court held that Petitioners alleged no predicate criminal act, it did not reach defendants' additional arguments that the complaint failed to allege the requisite pattern of racketeering, degree of control over an alleged enterprise, or conduct or direction of the enterprise's affairs, as required to state claims under RICO, 18 U.S.C. §§1962(b), (c), and (d).

The Fourth Circuit affirmed the district court's dismissal of all of Petitioners' claims. The court of appeals concluded that the three challenged provisions did not fall within the plain meaning of "pay, lend, or deliver" any "money or other thing of value," as required to violate Section 302(a). Pet. App. 9a-10a ("Under the plain language of the statute, the concessions made by Freightliner in the Card Check Agreement do not involve the payment or delivery of a 'thing of value.'"). The court recognized that its interpretation of the plain language of Section 302(a) is "buttressed by §302's penalty provision" in Section 302(d) which hinges on the monetary amount of the bribe. *Id.* at 11a.

The court also found that this reading of the plain language of the statute is consistent with Congress' purpose in enacting Section 302. *Id.* at 10a-11a. The court explained that "§302 was enacted to curb abuses that Congress felt were 'inimical to the integrity of the collective bargaining process.'" *Id.* at 10a (quoting *Arroyo v. United States*, 359 U.S. 419, 425 (1959)).

The Court concluded that the provisions at issue "do not involve bribery or other corrupt practices." *Id.* at 10a ("By no stretch of the imagination are the concessions a means of bribing representatives of the Union"). And, because the challenged provisions "eliminate the potential for hostile organizing campaigns in the workplace," "the concessions certainly are not inimical to the collective bargaining process." *Id.* at 10a-11a.

The Fourth Circuit also explained that this holding is "consistent with a decision on similar facts from the Third Circuit." *Id.* at 11a-12a (citing *Sage Hospitality*, 390 F.3d at 218-219). The court quoted extensively from the Third Circuit's holding and rationale, and concluded: "We agree with the Third Circuit that an agreement setting forth ground rules to keep an organizing campaign peaceful does not involve the delivery of a 'thing of value' to a union." *Id.* at 12a.

Finally, the Fourth Circuit noted that Petitioners' "real beef in this case seems to be with the concessions made by the Union," rather than what the employer provided to the union. *Id.* The court explained that any union bargaining concessions "do not bring §302 into play, because §302 only precludes employers from delivering (and the union or union representatives from receiving) 'things of value.'" *Id.* And the Fourth Circuit set forth in detail the numerous alternative remedies available under the NLRA that exist to address such concerns. *Id.* at 12a-13a ("it is important to note that adequate remedies under the NLRA are available to employees, allowing them to challenge agreements similar to the two agreements in this case"). Thus, the court concluded, "[t]he availability of such adequate remedies severely

undermines the Employees' attempt to stretch §302 in a manner inconsistent with both the statute's plain meaning and Congress' intent in passing the statute." *Id.* at 14a.

REASONS FOR DENYING THE PETITION

I. The Fourth Circuit's Decision Is Consistent With All Other Cases Interpreting Section 302 of the LMRA and Does Not Conflict with Any Precedent From This Court.

Every federal court to consider the precise issue raised here has held, like the Fourth Circuit, that voluntary labor-management agreements that provide mutually acceptable organizing rules do not violate Section 302. Petitioners attempt to manufacture a conflict among the courts of appeals, but the decisions they rely upon interpret *other* statutes that contain different language and structures and cover unrelated conduct.

A. Both circuits that have considered Petitioners' argument have held that a voluntary agreement providing for access, information sharing, and employer neutrality does not violate Section 302. Pet. App. 9a-14a; *Sage Hospitality*, 390 F.3d at 219. There are no decisions holding – or even suggesting – that such routine labor-management agreements violate that statute.

In *Sage Hospitality*, the Third Circuit pointedly rejected the argument that a labor-management neutrality agreement is a "thing of value" for purposes of

Section 302. 390 F.2d at 209-10.[2] In a passage quoted verbatim by the Fourth Circuit in this case (see Pet. App. 12a), the Third Circuit, per Judge Chertoff, expressly rejected the argument made by Petitioners here that any benefit of the agreement to the union satisfies the plain meaning of "other thing of value" in Section 302:

> Not surprisingly, Sage is unable to provide any legal support for the remarkable assertion that entering into a valid labor agreement governing recognition of a labor union amounts to illegal labor bribery. There are many reasons why this argument makes no sense, including the language of section 302 itself, which proscribes agreements to "pay, lend, or deliver ... any money or other thing of value." The agreement here involves no payment, loan, or delivery of anything. The fact that a Neutrality Agreement – like any other labor arbitration agreement – benefits both parties with efficiency and cost saving does not transform it into a payment or delivery of some benefit. Furthermore, any benefit to the union inherent in a more efficient resolution of recognition disputes does not constitute a "thing of value" within the meaning of the statute.

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[2] The district court opinion in *Sage Hospitality* makes clear that case involved the same contractual provisions as this case. *Hotel Employees and Rest. Employees Union v. Sage Hospitality Resources*, 299 F. Supp. 2d 461, 465 (W.D. Pa. 2003). All three district courts to consider the issue have also been unanimous in rejecting Petitioners' argument. Pet. App. 15a; *Hotel Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 299 F. Supp. 2d 461, 465 (W.D. Pa. 2003); *Patterson v. Heartland*, 428 F. Supp. 2d 714, 724 (N.D. Ohio 2006).

390 F.3d at 219. The Third Circuit further explained that the proposed reading of Section 302 was also contrary to the structure and purposes of the federal labor laws that include Section 302:

> Apart from the plain language of section 302, the structure of other provisions of the labor law also militates against Sage's position. Issues of labor-unit recognition and bargaining are comprehensively regulated by the NLRA. Courts have repeatedly upheld labor-management agreements providing for arbitration over recognition disputes. *See, e.g., Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993); *Hotel Employees, Rest. Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992). Sage's interpretation of section 302 would wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions.

Id.

As the Fourth Circuit expressly recognized, its holding in this case is squarely aligned with the holding of the Third Circuit in *Sage Hospitality*. Pet. App. 11a-12a. In the sixty-two years since Congress enacted Section 302, no court has ever reached the contrary conclusion that an employer has committed a crime by entering into the neutrality and access provisions routinely found in voluntary recognition agreements.[3]

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[3] Section 302 is a criminal provision. During the lengthy sixty-two-year period since its enactment, there is no record of any prosecution taking the position that an employer or union have violated the law by entering into voluntary agreements providing for mutually acceptable organizing rules.

The Third and Fourth Circuit decisions did not occur in a vacuum. They are consistent with long-standing law from both this Court and the National Labor Relations Board upholding the legality of an employer's agreement to voluntarily recognize a union upon a showing of majority employee support, and an employer's agreement to remain neutral with respect to the employees' choice of representative. *United Mine Workers of America v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72 n.8, 75 (1956) (voluntary recognition lawful); *see also Rockwell Int'l Corp.*, 220 N.L.R.B. 1262, 1263 (1975) (voluntary recognition by agreement is a procedure "long accepted and sanctioned by the [National Labor Relations] Board"); *Verizon Information Systems*, 335 N.L.R.B. 558, 559-60 (2001) (enforcing neutrality and voluntary recognition agreement).[4]

B. The only two Section 302 cases relied upon by Petitioners to try to justify a purported conflict among the courts of appeals are consistent with, rather than contrary to, the holding in this case. Pet. 29 (citing *NLRB v. BASF Wyandotte*, 798 F.2d 849 (5th Cir. 1986) and *United States v. Schiffman*, 552 F.2d 1124 (5th Cir. 1997)).

Contrary to Petitioners' description (Pet. 8, 29), in *BASF Wyandotte*, the court of appeals never addressed the issue of whether payment to a union officer and lending him an office and copier fall within

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[4] This Court has also made clear that an employer's right to choose to communicate its opposition, neutrality, or support for a union to its employees is protected by both the National Labor Relations Act ("NLRA") and the First Amendment. 29 U.S.C. §158(c); *Chamber of Commerce of U.S. v. Brown*, 128 S. Ct. 2408, 2414 (2008); *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477 (1941).

the scope of §302(a). The court held only that the payments at issue in that case fell within an exception in Section 302(c)(1) for payments to employees related to bone fide employment activities. *Id.* at 855-56.[5] Moreover, that case did not involve a neutrality and voluntary recognition agreement, but rather, a company that appeared to be "paying a substantial part of the union's administrative expenses." *Id.* at 858 (Jolly, J., concurring). And, the Fifth Circuit relied upon the same understanding of the purpose of Section 302 as the Third and Fourth Circuit. *Id.* ("[T]he purpose of § 302 was the limited one of preventing bribery, extortion, shakedowns and other corrupt practices.") (citations, quotation marks and brackets omitted).

Similarly, *Schiffman* did not hold that the "use of hotel rooms" is a "thing of value." Pet. 29. The thing of value in that case was money – actual savings resulting from a discounted hotel rate demanded by a union official. 552 F.2d at 1126 ("[T]he special rate was a thing of value demanded by appellant from the hotel, in violation of the statute.").

C. Petitioners claim that the Fourth Circuit's holding creates a split of authority with other courts of appeals that have interpreted the words "thing of value" or "anything of value." But the cases cited by Petitioners involve different, completely unrelated federal statutes, and none involve the application of

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[5] Petitioners' description of the case as *holding* that "use of company property is a 'thing of value' to a union under §302(a)" at 798 F.2d at 856 & n.5 is not accurate. Pet. 8, 29. The Fifth Circuit does not discuss the term "thing of value" or the scope of Section 302(a) in the cited section or elsewhere in that decision. An assumption reached *sub silentio* does not create a circuit conflict.

those disparate statutes to otherwise lawful labor-management agreements. Pet. 26-32.

There is simply no conflict with decisions interpreting other statutes. Contrary to Petitioners' representation that this case involves a "term of art," the language in each of these statutes, and the context in which that language appears, differs significantly. None of these statutes uses Section 302's operative language: "pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value." *Compare* 29 U.S.C. §186(a) *with* 18 U.S.C. §201; 18 U.S.C. §641; 18 U.S.C. §666(a)(1)(B); 18 U.S.C. §876; and 18 U.S.C. §1954.

Interpretation of each of these disparate statutes depends, as this Court has consistently instructed, on the words used by Congress and the context in which those words are used. *Abuelhawa v. United States*, 129 S. Ct. 2102, 2105 (2009) ("statutes are not read as a collection of isolated phrases"); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

Moreover, Petitioners' argument that the Third and Fourth Circuits' interpretation of "thing of value" conflicts with other Circuits' interpretations of unrelated statutes also ignores the word "deliver" in Section 302, relied upon by the courts of appeals. Pet. App. 9a, 12a; *Sage Hospitality*, 390 F.3d at 219 ("The agreement here involves no payment, loan, or delivery of anything."). None of the statutes at issue in Petitioners' cases use the phrase "pay, lend, or deliver" used in Section 302. 18 U.S.C. §201(b)

("corruptly gives, offers or promises"); 18 U.S.C. §666(a)(1)(B), ("corruptly solicits or demands"); 18 U.S.C. §201(c)(1)(B) ("demands, seeks, receives, accepts, or agrees to receive"); 18 U.S.C. §641 ("embezzles, steals, purloins, or knowingly converts to his use or the use of another"); 18 U.S.C. §876 ("with intent to extort from any person any . . . ."); 18 U.S.C. §1954 ("receives or agrees to receive or solicits").

Finally, none of the cases cited by Petitioners apply these diverse statutory prohibitions to provisions of a labor-management agreement establishing organizing rules comparable to the agreement at issue here. The Third and Fourth Circuit's holdings extend no further than the issue that was directly before those courts: did Congress intend Section 302 to criminalize an employer's agreement to rules governing union organizing campaigns. Petitioners' assertion that Third and Fourth Circuits' decisions regarding Section 302 will somehow "limit[] the scope" of these vastly different criminal statutes, thereby somehow creating a circuit conflict, is plainly wrong. Pet. 33-34.

II. The Fourth Circuit Properly Rejected Petitioners' Proposed Expansion of Section 302 to Make Employers and Unions Criminally Liable for Entering Into Neutrality and Voluntary Recognition Agreements.

The Fourth Circuit correctly held that the plain language of Section 302(a) does not extend to mutually agreeable ground rules for union organizing campaigns, and that its reading of the statute is consistent with the purpose of Section 302. Pet. App. 9a-11a.

The court of appeals properly determined the plain meaning of "pay, lend, or deliver . . . any money or other thing of value" in light of "'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" Pet. App. 9a (*quoting Robinson*, 519 U.S. at 341). As both the Fourth Circuit and the Third Circuit in *Sage Hospitality* held, an employer's agreement to mutually acceptable organizing rules does not "involve the delivery of any tangible or intangible items to the union." Pet. App. 9a; *Sage Hospitality*, 390 F.3d at 219.[6] Moreover, the Fourth Circuit's conclusion that Congress intended Section 302 to apply to items with "ascertainable value" and not to mutually acceptable organizing rules is "buttressed by §302's penalty provision," (Pet. App. 11a), which hinges the determination of whether a violation is a felony or misdemeanor on the monetary value of the bribe. 29 U.S.C. §186(d)(1),(2) ("if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor . . . .").

The Fourth Circuit also correctly concluded that while the plain meaning of the statute is conclusive, its interpretation is supported by the Congressional purpose. Pet. App. 10a. Relying on this Court's decision in *Arroyo v. United States*, 359 U.S. 419 (1959), the Fourth Circuit pointed out that Congress enacted Section 302 to prevent the "'corruption of collective bargaining through bribery of employee representatives by employers.'" Pet. App. 10a (*quoting Arroyo*, 359 U.S. at 425-26). The court held that the neutral-

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[6] An employer's agreement to remain neutral, to allow access, and to participate in an informational meeting are odd direct objects to the verbs "pay," "lend," and "deliver."

ity and access provisions challenged here do not threaten the integrity of collective bargaining because "the concessions serve the interests of both Freightliner and the Union, as they eliminate the potential for hostile organizing campaigns in the workplace. In this sense, the concessions certainly are not inimical to the collective bargaining process." Pet. App. 10a-11a.

In contrast, Petitioners' limitless interpretation of the phrase "pay, lend, or deliver . . . any money or other thing of value" in Section 302 as anything with "value" to a union would lead to absurd results contrary to the purposes of the statute and this Court's precedent. Extending Section 302 (and RICO) as Petitioners advocate – to anything with "value" to a union – would criminalize voluntary recognition agreements, and other forms of valued labor-management cooperation. This would be directly contrary to this Court's long-standing holding that an employer's agreement to voluntarily recognize a union upon a showing of majority support is lawful. *United Mine Workers of America v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72 (1956).[7]

Petitioners' theory would criminalize business decisions that an employer has the freedom to make. An employer, faced with a union organizing campaign at its plant, is free to actively and vocally oppose the campaign. *See, e.g., Brown*, 128 S. Ct. at 2414. But

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[7] Such a holding would also completely undermine the NLRA's important goal of fostering cooperative labor-management relationships. *See, e.g., MGM Grand Hotel, Inc.*, 329 N.L.R.B. 464, 466 (1999) ("It is a long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations.").

an employer might evaluate factors such as the potential disruption caused by a prolonged and acrimonious organizing campaign and decide – legally – not to oppose the union. Similarly, based on practical considerations, such as the economic impact of a rancorous union organizing campaign, an employer can choose to enter into an agreement with the union that sets forth ground rules for the organizing campaign – terms that can include limited access to a plant and employer neutrality. However, under Petitioners' extreme premise, these actions would be "things of value" under Section 302(a) because they have subjective value to the union. By not fighting union organization with every weapon in its arsenal, the employer would have committed a crime.

Moreover, as the Third Circuit in *Sage Hospitality* recognized, extending Section 302 to anything of "value" to a union would "wreak havoc" on the "carefully balanced" legal structure of collective bargaining. 390 F.3d at 219; *see also* Pet. App. 17a. Successful collective bargaining virtually always results in agreements that contain non-monetary provisions that could be characterized as benefitting the union. Petitioners' theory would criminalize, for example, many common garden-variety collective bargaining clauses that provide utility to both the union as an institution and to its employee members:

- Access to employer facilities. Access is a mandatory subject of bargaining under the NLRA. *See Arizona Portland Cement Co.*, 302 N.L.R.B. 36, 44 (1991).
- Exclusive grievance rights. Bargaining agreements typically grant the union, not employees, the exclusive right to file and pursue

employee grievances. *See Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967).

- Union security clauses. Another mandatory subject of bargaining. *See, e.g.*, 29 U.S.C. §158(a)(3); *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998).

- Successorship clauses. These maintain the union's status as the exclusive collective bargaining representative and are mandatory subjects of bargaining. *See, e.g., United Mine Workers (Lone Star Steel Co.)*, 231 N.L.R.B. 573, 574-75 (1977), *enf. granted in relevant part and denied in other part*, 639 F.2d 545, 550-56 (10th Cir. 1980).

As the Fourth Circuit recognized, Section 302 was intended to *promote* collective bargaining, not to criminalize it by equating concessions made by an employer to a union as a bribe. Pet. App. 10a-11a.

Petitioners' argument rests entirely on allegations regarding what the union provided the employer (Pet. 19-24) – in the Fourth Circuit's words, this is Petitioners' "real beef." Pet. App. 12a. But, as the Fourth Circuit held, what a union allegedly provided to an employer "do[es] not bring Section 302 into play," because that provision only covers employer bribes of unions. Pet. App. 12a-13a.

In rejecting Petitioners' Section 302 claims, the Fourth Circuit emphasized that the NLRA contains a variety of mechanisms to deal with Petitioners' accusations of improper union concessions. Pet. App. 12a-13a ("it is important to note that adequate remedies under the NLRA are available to employees, allowing them to challenge agreements similar to the two

agreements in this case").[8] For example, Sections 8(a)(2) and 8(b)(1)(A) of the NLRA prohibit employers and unions from bargaining over wages, fringe benefits, and other terms and conditions of employment before the union receives the support of a majority of bargaining unit employees. 29 U.S.C. §§158(a)(2) and (b)(1)(A); *see, e.g., International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altman Texas Corp.),* 366 U.S. 731, 737 (1961). The NLRB regulates the line between lawful labor-management cooperation, and unlawful employer dominance, interference or financial support for a union under 29 U.S.C. §158(a)(2) and (b)(1)(a), and has a carefully created system of remedies under these provisions. *See, e.g., Longchamps, Inc.*, 205 N.L.R.B. 1025, 1031 (1973). And, courts provide damages or injunctive relief if a union violates its duty of fair representation. *See, e.g., Air Line Pilots v O'Neill,* 499 U.S. 74 (1991); *Vaca v, Sipes*, 386 U.S. 171 (1967). Thus, as the Fourth Circuit concluded, "[t]he availability of such adequate remedies severely undermines the Employees' attempt to stretch §302 in a manner inconsistent with both the statute's plain meaning and Congress' intent in passing the statute." Pet. App. 14a.

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[8] The Fourth Circuit noted that "[in] this case, unfair labor practice charges were, in fact, filed against Freightliner and the Union and were settled to the satisfaction of the NLRB." Pet. App. 14a.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN P. BERZON
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Counsel for Respondent United Automobile, Aerospace, and Agricultural Implement Workers of America

WILLIAM L. RIKARD, JR.
Counsel of Record
PARKER, POE, ADAMS & BERNSTEIN LLP
Three Wachovia Center
401 South Tryon Street
Suite 300
Charlotte, NC 28202
(704) 372-9000

Counsel for Respondent Freightliner, LLC

APPENDIX

APPENDIX

§ 186. Restrictions on financial transactions

. . . .

(d) Penalties for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of

the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(4)

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Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM L. MESSENGER
Counsel of Record
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Counsel for Petitioners

August 6, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. Respondents Do Not Dispute The Importance of This Case	1
II. The Petition Should Be Granted Because Exempting Organizing Assistance From § 302 Allows Unions to Subvert The Organizing and Collective Bargaining Procedures of the National Labor Relations Act	2
A. Section 302 Must Be Enforced as Written to Prevent Unions From Supplanting the NLRA's Organizing Procedures	3
B. Section 302 Must be Enforced as Written to Prevent Corruption of the NLRA's Collective Bargaining Process	4
C. That Respondents' Conduct Violates the NLRA Does Not Justify Not Enforcing § 302 as Written	6
III. Respondents Have Not Rebutted The Existence of a Circuit Split Regarding the Proper Interpretation of "Thing of Value"	8
CONCLUSION	12

TABLE OF AUTHORITIES

CASES	Page
Arroyo v. United States, 359 U.S. 419 (1959)	6, 11
Chamber of Commerce v. Brown, 128 S. Ct. 2408 (2008)	3
Connecticut National Bank v. Germain, 503 U.S. 249 (1992)	7
Dana Corp., 351 N.L.R.B. 434 (2007)	3
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)	4
Hospital Employees' Division of Local 79, SEIU v. Mercy-Memorial Hospital Corp., 862 F.2d 606 (6th Cir. 1988), *judgment vacated on other grounds*, 492 U.S. 914, *on remand*, 881 F.2d 1076 (6th Cir. 1989)	7
International Longshoremen & Warehousemen's Union v. Juneau Spruce Corp, 342 U.S. 237 (1952)	7
Lechmere v. NLRB, 502 U.S. 527 (1992)	3
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991)	11
Local 144, Nursing Home Pension Fund v. Demisay, 508 U.S. 581 (1993)	11
Majestic Weaving Co., 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds*, 355 F.2d 854 (2d Cir. 1966)	5
NLRB v. BASF Wyandotte, 798 F.2d 849 (5th Cir. 1986)	8, 9

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)	3
NLRB v. Lion Oil Co., 352 U.S. 282 (1957)	2, 6
Thomas Built Buses (Int'l Union, UAW), Case No. 11-CA-20038 (NLRB Div. of Advice Memo. 2004)	6
United States v. Batchelder, 442 U.S. 114 (1979)	7
United States v. Collins, 56 F.3d 1416 (D.C. Cir. 1995)	10
United States v. Croft, 750 F.2d 1354 (7th 1984)	9
United States v. Freeman, 208 F.3d 332 (1st Cir. 2000)	10
United States v. Girard, 601 F.2d 69 (2d Cir. 1979)	9
United States v. Jeter, 775 F.2d 670 (6th 1985)	9
United States v. Marmolejo, 89 F.3d 1185 (1996)	10
United States v. May, 625 F.2d 186 (8th Cir. 1980)	9
United States v. Ryan, 350 U.S. 299 (1956)	11
United States v. Schiffman, 552 F.2d 1124 (5th Cir. 1977)	8, 9

TABLE OF AUTHORITIES—Continued

	Page
United States v. Williams, 705 F.2d 603 (2d Cir. 1983)	10
Vaca v. Sipes, 386 U.S. 171 (1967)	7
STATUTES	
7 U.S.C.A. § 2008s(a)(3)(D)	11
18 U.S.C. § 641	9
18 U.S.C. § 666	10
16 U.S.C.A. § 2114(c)	11
29 U.S.C. § 158	*passim*
29 U.S.C. § 159	3, 4
29 U.S.C. § 186	*passim*
29 U.S.C. § 187	7
29 U.S.C.A. § 772(a)(1)	11
38 U.S.C.A. § 4215(c)	11
LEGISLATIVE HISTORY	
92 Cong. 4891 (Sen. Byrd)	5
S. Rep. No. 86-187 (1959), *reprinted* 1959 U.S.C.C.A.N. 2318	4

IN THE

Supreme Court of the United States

No. 08-1319

RONNIE ADCOCK *et al.*,
Petitioners,

v.

FREIGHTLINER LLC *et al.*,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. Respondents Do Not Dispute The Importance of This Case

Respondents UAW and Freightliner do not contest that this petition presents an issue of exceptional importance: whether section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, prohibits unions from demanding and receiving valuable assistance from employers in organizing. (Pet. 9-24).

Specifically, Respondents tacitly recognize that unions increasingly are: seeking organizing assistance from employers, (Pet. 12-15); pressuring and extorting resistant employers for organizing assistance

through "corporate campaigns," (Pet. 23-24); and, compromising employee interests during collective bargaining in exchange for organizing assistance, (Pet. 21-23). These facts were also made clear by amici National Federation of Independent Business and Society for Human Resource Management. (Amicus Br. 4-7).

The importance of this case to employees, employers, and unions is incontrovertible. Indeed, this case presents the most important question in labor law today. Whether unions can demand organizing assistance from employers as a price for labor peace and submissiveness at the bargaining table has the greatest significance to a national labor policy that favors employee free choice and disfavors company unions. Consequently, the writ should issue. *See NLRB v. Lion Oil Co.*, 352 U.S. 282, 285 (1957) (granting certiorari because trend amongst unions to enter into certain agreements made case of great importance).

II. The Petition Should Be Granted Because Exempting Organizing Assistance From § 302 Allows Unions to Subvert The Organizing and Collective Bargaining Procedures of the National Labor Relations Act

Respondents argue that enforcing § 302 in this case will undermine the National Labor Relation Act's organizing and collective bargaining procedures. (Opp. Br. 13-16). This is the height of effrontery. The very purpose of Respondents' scheme is to *supplant* the NLRA's procedures with a private agreement. (Pet. 12-13). And the purpose of 302 is to protect the integrity of the NLRA's collective bargaining and organizing procedures from private sweetheart deals between unions and employers. It is imperative that the Court take this case to prevent unions from

upending the NLRA through private organizing agreements.

A. Section 302 Must Be Enforced as Written to Prevent Unions From Supplanting the NLRA's Organizing Procedures

"By its plain terms . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." *See Lechmere v. NLRB*, 502 U.S. 527, 532 (1992). To effectuate employee free choice during organizing campaigns, the NLRA provides for secret-ballot elections conducted under § 9(a) of the Act, 29 U.S.C. § 159(a),[1] and an "uninhibited, robust, and wide-open debate" about unionization between employer and union under § 8(c) of the Act, 29 U.S.C. § 158(c), *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2413-14 (2008) (quotation omitted). The NLRA does not grant unions a right to assistance from employers with organizing their employees. *See Lechmere,* 502 U.S. at 532-34.

Union organizing agreements turn the NLRA's organizing process on its head. They eliminate the NLRA's protections of employee free choice by banning secret-ballot elections and gagging employer speech about unionization. *See, e.g.,* Card Check Agreement, ¶¶ 4, 9 (Pet. App. 39a, 41a). These employee protections are replaced with employer assistance to the union. The NLRA's "bottom-up" organizing process is upended into a "top-down" process. (*See* Pet. 12-13).

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[1] 29 U.S.C. § 159(a); *see NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969); *Dana Corp.*, 351 N.L.R.B. 434, 438-40 (2007).

Congress prohibited top-down organizing when it amended § 302 to apply to organizing activities. Section 302 originally prohibited only employer delivery of money or things to current union "representatives." In 1959, the prohibition was extended to: (1) "any labor organization" that "*seeks to represent*, or would admit to membership, any of the employees of such employer," 29 U.S.C. § 186(a)(2) (emphasis added); and, (2) "any employee or group or committee of employees . . . for the purpose of causing such employee or group or committee . . . to influence any other employees in the exercise of the *right to organize* and bargaining collectively through representative of their own choosing." 29 U.S.C. § 186(a)(3) (emphasis added). *See* S. Rep. No. 86-187 (1959), *reprinted* 1959 U.S.C.C.A.N. 2318, 2330.

Thus, in unmistakable terms, Congress prohibited unions from demanding things of value from employers of employees they seek to organize. Nevertheless, unions are aggressively seeking organizing assistance from employers to circumvent the NLRA's organizing process. (Pet. 12-15). It is imperative that the Court determine the legality under § 302 of this top down organizing model.

B. Section 302 Must be Enforced as Written to Prevent Corruption of the NLRA's Collective Bargaining Process

The collective bargaining process the NLRA establishes involves a union dealing with an employer strictly as a fiduciary representative of *employees* with respect to the wages, benefits, and other things the employer provides to its *employees* for their services. *See* 29 U.S.C. §§ 159(a) & 158(d); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953). It does *not* involve a union dealing with an employer for

itself. Such self-dealing is inimical to legitimate bargaining and strictly prohibited by § 302. (Pet. Br., 20-22).[2]

Organizing agreements upend the collective bargaining process. Unions deal for themselves when negotiating organizing agreements, not for employees they exclusively represent.[3] Organizing agreements require employer delivery of valuable things directly to unions, not to employees for their services.

Worse, unions compromise employee interests in collective bargaining in exchange for organizing assistance. (Pet. 21-23). Here, as quid pro quo for organizing assistance from Freightliner, the UAW secretly agreed to wage, benefit, transfer rights, severance, overtime, strike, subcontracting, job qualification, and overtime concessions in the Preconditions Agreement (App. 43a-44a), and a wage freeze and increase in benefits costs at a facility in Mt. Holly, North Carolina.

Section 302 exists to protect the integrity of the NLRA's collective bargaining process from union self-

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[2] Legitimate collective bargaining does not violate § 302 because nothing is delivered to the union itself under § 302(a) that is not permitted by § 302(c). Section 302(a) "does not prohibit the employee himself from accepting money or other things of value if it is directly paid to the employee by the employer." 92 Cong. 4891 (Sen. Byrd). Section 302(c) exempts those few legitimate employee benefits that also result in the delivery of something to their union representative. The contract terms cited on pages 14-15 of Respondents brief are lawful for these reasons.

[3] By definition, organizing agreements are negotiated *before* the union is the representative of the employees it seeks to organize. This is generally unlawful under the NLRA. *See Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds*, 355 F.2d 854 (2d Cir. 1966).

dealing.[4] The statute strictly prohibits union receipt of any "thing of value" from employers to ensure that unions *only* deal with employers as employee representatives. This, in turn, ensures that unions cannot be induced to sacrifice employee interests to satiate union self-interests. (Pet. 10-12, 20-23).

Widespread union self-dealing for organizing assistance is incompatible with the collective bargaining process Congress envisioned in the NLRA and § 302. At the very least, it represents a drastic change in a process formerly predicated on unions acting solely as employee representatives. It is imperative that this Court determine whether this rampant union practice is lawful under § 302. *Cf. Lion Oil*, 352 U.S. at 285.

C. That Respondents' Conduct Violates the NLRA Does Not Justify Not Enforcing § 302 as Written

Respondents claim that it is relevant that the NLRA provides remedies for Respondents' conduct. (Opp. Br. 15-16). Although it is true that Respondents' conduct violates § 8 of the NLRA,[5] this is no reason for not enforcing § 302 as written.

"[S]o long as there is no 'positive repugnancy' between two laws, a court must give effect to both."

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[4] *See Arroyo v. United States*, 359 U.S. 419, 425 (1959) (Section 302 was "enacted as part of a comprehensive revision of federal labor policy in the light of experience acquired during the years following passage of the . . . [NLRA] and was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process"); (Pet. 10-12).

[5] *See Thomas Built Buses (Int'l Union, UAW)*, Case No. 11-CA-20038 (NLRB Div. of Advice Memo. 2004) (Pet. App. 20a, 27a-28a)

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) (quotation omitted). The mere fact that two statutory prohibitions apply to the same conduct does not justify not enforcing one of them. *See United States v. Batchelder*, 442 U.S. 114, 122 (1979).

"Both § 302 of LMRA and § 8 of the NLRA may make similar conduct unlawful, but each provides an independent remedy." *Hospital Employees' Div. of Local 79, SEIU v. Mercy-Memorial Hosp. Corp.*, 862 F.2d 606, 608 (6th Cir. 1988).[6] Therefore, § 302 can be enforced against conduct subject to § 8 of the NLRA. *Id.* at 608. Indeed, a contrary conclusion "would effectively repeal § 302 because the conduct proscribed by § 302 is almost always arguably subject to §§ 7 or 8 of the NLRA." *Id.*; *see also Int'l Longshoremen & Warehousemen's Union v. Juneau Spruce Corp*, 342 U.S. 237, 244 (1952) (remedies of § 303 of the LMRA, 29 U.S.C. § 187, are independent of the NLRA).

That the UAW's conduct violates § 8 of the NLRA does not excuse the Fourth Circuit's decision not to enforce § 302 as written. "[S]ection 302 is an independent liability-creating statute enacted by Congress to provide additional judicial remedies for certain wrongful conduct." *Mercy-Memorial Hosp.*, 862 F.2d at 608. Denial of those additional remedies because the NLRB General Counsel might not exercise his discretion to prosecute violations of § 8 would undermine the regime Congress established to protect employees from self-dealing by their union representatives. *Cf. Vaca v. Sipes*, 386 U.S. 171, 182-83 (1967).

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[6] *Further proceedings*, 492 U.S. 914 (*cert. granted & judgment vacated on other grounds*), *on remand*, 881 F.2d 1076 (6th Cir. 1989) (table) (reinstating § 302 ruling).

III. Respondents Have Not Rebutted The Existence of a Circuit Split Regarding The Proper Interpretation of "Thing of Value"

Employer assistance with organizing employees—specifically company-paid captive audience meetings for the union, use of private property for organizing, and gag clauses on speech against unionization—are plainly "thing[s] of value . . . to any labor organization." 29 U.S.C. § 186(a)(2). (Pet. 15-18). The UAW and other unions aggressively seek this assistance, give valuable consideration to obtain it, and use it to organize new dues-paying employees into union ranks. (*Id.*). There is nothing unions value more from employers whose employees they seek to unionize.

Respondents do not deny the value of organizing assistance to unions, but argue that "thing of value" in § 302 is limited to things with monetary value. (Opp. Br. 10-12). But, even if true—which it is not—that would not justify the Fourth Circuit's decision or diminish the conflict among circuits.

1. Foremost, organizing assistance has great monetary "value" to the UAW and other unions. It is obviously not worthless. In fact, unions and other organizations commonly pay for use of property, services of personnel, and communications. This was established in the petition, (Pet. 16-17), and never rebutted by Respondents.

Indeed, Respondents admit that union use of property was found to have monetary value in two § 302 cases decided by the Fifth Circuit. (*See* Opp. Br. 8-9) (discussing *NLRB v. BASF Wyandotte*, 798 F.2d 849, 858 (5th Cir. 1986) (Jolly J,. concurring); *United States v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir.

1977)). Use of a company office in *BASF Wyandotte* and of discounted hotel rooms in *Schiffman* had monetary value because they saved the unions money. Similarly, Freightliner giving the UAW free use of its facilities and paid work time of its personnel for organizing has monetary value because it reduced the UAW's organizing expenses. Thus, the Fourth Circuit's decision directly conflicts with the Fifth Circuit's decisions in those two cases.[7]

2. Respondents' argument does not diminish the conflict among circuits as to the meaning of the term "thing of value." The First, Second, Fifth, Sixth, Seventh, Eight, and D.C. Circuits all broadly construe this term of art in statutes that expressly require monetary value.

"Thing of value" in 18 U.S.C. § 641 is interpreted to encompass intangibles, use of property, services of personnel, and information, even though the statute requires a "face, par, or market value, or cost price."[8]

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[7] Contrary to Respondents' claim, the Fifth Circuit did hold that use of company property was a "thing of value" when finding that union use of a company office satisfied the exemption stated at § 302(c)(1) in *BASF Wyandotte*, 798 F.2d at 856. By its terms, § 302(c)(1) applies *only* to any "money or other thing of value" that meets certain conditions. 29 U.S.C. § 186(c)(1). Moreover, the court would not have considered if this exemption applied without first concluding that use of company property is a "thing of value" § 302(a) otherwise prohibits. That the Fifth Circuit did not devote much discussion to this conclusion simply reflects its obvious nature.

[8] *See United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (intangibles and information); *United States v. Jeter*, 775 F.2d 670, 680 (6th 1985) (intangibles, services of personnel, and information); *United States v. Croft*, 750 F.2d 1354, 1361-62 (7th 1984) (services of personnel); *United States v. May*, 625 F.2d 186, 191-92 (8th Cir. 1980) (use of property and services of per-

Similarly, "anything of value" in 18 U.S.C. § 666(a)(1)(B) requires a minimum monetary value, but is "broad in scope and contains no language restricting its application to transactions involving money, goods, or services." *United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996) (prison conjugal visits); *see also United States v. Freeman*, 208 F.3d 332, 341 (1st Cir. 2000) (use of nightclub property is "anything of value" under § 666).

The scope of "thing of value" is interpreted as broadly in statutes that require monetary value as in those that do not.[9] So irrespective of whether monetary value is required under § 302, the reality remains that the Fourth and Third Circuits have interpreted this statutory term differently and far more narrowly than the First, Second, Fifth, Sixth, Seventh, Eight, and D.C. Circuits. (Pet. 29-31).

3. Nothing in § 302 restricts "thing of value" to monetary worth in any event. The word "deliver" does not connote monetary value. That § 302(d) provides for additional criminal penalties if the value of the money or thing exceeds $1,000 does not change the fact *no monetary value* is required to establish a misdemeanor violation under § 302(d) or civil violation under § 302(e). 29 U.S.C. §§ 186(d)-(e).

Nor does "deliver" limit § 302 to tangible items. One can "deliver" services within the plain usage of

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sonnel); *United States v. Collins*, 56 F.3d 1416, 1419 (D.C. Cir. 1995) (intangibles and information).

[9] This is only logical, as how value is measured does not effect what *types* of things are a "thing of value." For example, worthless shares of stock lack monetary value, but are within the ambit of "thing of value." *See United States v. Williams*, 705 F.2d 603, 623 (2d Cir. 1983).

the term, including those at issue here. *Cf. Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, concurring) ("Where the state imposes upon the union a duty to *deliver services*, it may . . .") (emphasis added). In fact, the exact phrase "deliver services" appears in multiple statutes.[10]

Limiting § 302 to monetary worth makes no sense in light of the statute's purpose. Section 302 does not exist to prevent unions from acquiring wealth. It exists to prevent unions from compromising the interests of employees they exclusively represent in exchange for things from their employer. (Pet. 10-12). As the UAW's conduct makes clear, unions will sacrifice employee interests as a quid pro quo for valuable services that facilitate organizing. (Pet. App. 42a-43a).

4. "Thing of value" is used as broadly in § 302 as in every other statute, indeed as broadly as the man in the street would understand it. This Court has repeatedly recognized that § 302's "prohibitions . . . are drawn broadly." *Local 144, Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 585 (1993).[11] Congress intended § 302 as a prophylactic ban on employers giving *anything* of value to unions except as expressly permitted in § 302(c). (Pet. 10 n. 2 (quoting legislative history)).

It is beyond peradventure that employer services that assist union organizing are "thing[s] of value . . . to any labor organization." 29 U.S.C. § 186(a)(2). The

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[10] *See, e.g.*, 7 U.S.C. § 2008s(a)(3)(D); 16 U.S.C. § 2114(c); 29 U.S.C. § 772(a)(1); 38 U.S.C. § 4215(c).

[11] *Accord United States v. Ryan*, 350 U.S. 299, 305 (1956) (§ 302 a "broad prohibition"); *Arroyo v. United States*, 359 U.S. 419, 424 (1959) (same).

Fourth Circuit's decision to carve an unwritten organizing exemption into § 302 must be reviewed by this Court because it does exceptional violence to both the language and purpose of the statute and conflicts with this Court's prior understanding of that statute.

CONCLUSION

The Petition for a Writ of Certiorari should be granted to settle the important question of national labor policy this case presents.

Respectfully submitted,

WILLIAM L. MESSENGER
Counsel of Record
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Counsel for Petitioners

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Petitioner,

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Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF THE PETITIONER

Maurice Baskin
Venable LLP
575 7th St., N.W.
Washington, D.C.
(202) 344-4000

Counsel for Amici

No. 08-1319

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SUPREME COURT OF THE UNITED STATES

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On Petition For Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

The National Federation of Independent Business Small Business Legal Center (NFIB) and the Society for Human Resource Management (SHRM), by undersigned counsel, hereby move pursuant to Court Rule 37 for leave to file a brief as *amici curiae* in support of the Petition for Writ of Certiorari in the above-captioned matter. As grounds for this motion, the *Amici* state as follows:

1. NFIB is the nation's leading small business association, with offices in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Both NFIB and SHRM have filed *amicus* briefs with this Court on issues of great importance to their members and to the business community as a whole.

2. NFIB AND SHRM seek leave to file this *amici* brief in support of the Petitioner because the Petition raises issues of great importance to the business community. In particular, NFIB and SHRM wish to bring to the Court's attention the adverse impact on public policy and labor law generally if the Fourth Circuit's decision is allowed to stand. The Fourth Circuit's misreading of LMRA Section 302's "thing of value" prohibition not only creates a conflict among the circuits, but will also improperly encourage unions to extort valuable organizational assistance from employers, violating the plain language of section 302.

3. The *Amici* have timely informed counsel for all parties of their intent to file this *amici* brief. The Petitioners and the Union Respondent have consented to this filing but Respondent Freightliner has declined to do so.

Wherefore, for the reasons above stated, NFIB and SHRM request that their motion for leave to file the attached brief as *amici curiae* be granted.

Respectfully submitted,

Maurice Baskin
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
(202) 344-4823

Counsel for *Amici*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

INTERESTS OF THE *AMICI*.....1

SUMMARY OF ARGUMENT..... 2

ARGUMENT..... 3

I. ABSENT REVIEW BY THIS COURT, THE FOURTH CIRCUIT'S MISREADING OF SECTION 302'S "THING OF VALUE" PROHIBITION WILL IMPROPERLY ENCOURAGE UNIONS TO EXTORT VALUABLE ORGANIZATIONAL ASSISTANCE FROM EMPLOYERS, VIOLATING THE PLAIN LANGUAGE OF SECTION 302.

CONCLUSION.....9

TABLE OF AUTHORITIES

CASES

Arroyo v. United States, 359 U.S. 419 (1959) 4

Diamond Walnut Growers v. NLRB, 113 F. 2d 1259 (D.C. Cir. 1997); 5

Food Lion, Inc. v. UFCW, 103 F.3d 1007 (D.C. Cir. 1997)); 5

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FEDERAL LAWS AND LEGISLATIVE HISTORY

29 U.S.C. §158(a)(2).....10

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Stewart, *"Neutrality" and "Card Check" Agreements: Union Assaults On Employee Rights And The Integrity Of The National Labor Relations Board*, Vol. 27 J. Lab. Res. 443 (Fall 2006) 7

INTERESTS OF THE *AMICI* [1]

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small business association, with offices in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents about 350,000 member businesses nationwide. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to

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[1] Pursuant to Supreme Court Rule 37.2, the *Amici* state that all parties have consented to the filing of this brief, except for Respondent Freightliner. Therefore, a motion for leave to file is being submitted together with this brief. Pursuant to Supreme Court Rule 37.6, the *Amici* further state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

NFIB AND SHRM are filing this *amici* brief in support of the Petition because the Petition raises issues of great importance to the business community. In particular, NFIB and SHRM wish to bring to the Court's attention the adverse impact on public policy and labor law generally if the Fourth Circuit's decision is allowed to stand.

SUMMARY OF ARGUMENT

The Fourth Circuit's failure to enforce the plain language of Section 302 leaves employers at the mercy of union corporate campaigns whose primary purpose is to extort organizational assistance. Such assistance is inherently valuable to unions, and that is why they are willing to spend significant resources on corporate campaign pressure tactics in order to obtain it. Many of the *Amici's* members have been the targets of such campaigns. Employers require the protection of Section 302 in order to remove the incentives that currently exist for unions to engage in corporate campaigns. This Court's review of the Petition is urgently required in order to restore meaning to Section 302 by recognizing that organizational assistance is a "thing of value" which unions should not be allowed to extort.

ARGUMENT

I. ABSENT REVIEW BY THIS COURT, THE FOURTH CIRCUIT'S MISREADING OF SECTION 302'S "THING OF VALUE" PROHIBITION WILL IMPROPERLY ENCOURAGE UNIONS TO EXTORT VALUABLE ORGANIZATIONAL ASSISTANCE FROM EMPLOYERS, VIOLATING THE PLAIN LANGUAGE OF SECTION 302.

By declaring that employer assistance to union organizing is not a "thing of value" within the meaning of Section 302, the Fourth Circuit's decision allows unions to put pressure on employers to obtain such assistance, including access to private property, paying for and conducting mass meetings of employees, communications, and confidential information. Union pressure tactics against many employers, including members of the *Amici*, are becoming widespread because of the courts' failure to enforce Section 302 according to its plain meaning and original intent. The *Amici* are therefore submitting this brief in order to make the Court aware of the adverse continuing impact on the business community that will result from the Fourth Circuit's erroneous decision, absent review by this Court.

As explained in the Petition, Section 302 was intended "to deal with 'extortion or a case where the union representative is shaking down the employer.'" *Arroyo v. United States*, 359 U.S. 419, 426 n.8 (1959)

(quoting 93 Cong. Rec. 4746 (Sen. Taft)). Congress sought to "prohibit[ ], among other things, the buying and selling of labor peace." S. Rep. No. 98-225 (1984), reprinted 1984 U.S.C.C.A.N. 3182, 3477. *See also* S. Rep. No. 86-187 (1959), reprinted 1959 U.S.C.C.A.N. 2318, 2329 (congressional intent that the statute be "applicable to all forms of extortion or bribery in labor-management relations.").

Significantly, the statute does not merely prohibit payment of money to union agents who already represent the employer's employees. Instead, Section 302 prohibits both the payment of "money *or* other thing of value" (emphasis added); and the Act expressly prohibits employers from providing such things "to any labor organization ... which ... seeks to represent ... any of the employees of such employer."

Many employers have already become targets of union "corporate campaigns" whose stated purpose is to pressure them to enter into organizing assistance agreements. These union campaigns are unquestionably a form of extortion designed to gain something from employers that has great value to unions, *i.e.*, assistance in organizing the employers' employees. *See* Northrup & Steen, *Union 'Corporate Campaigns' as Blackmail: the RICO Battle at Bayou Steel*, 22 Harv. J.L. & Pub. Pol'y 771, 779-93 (1999).

Though not addressed by the Fourth Circuit, union corporate campaigns have been acknowledged by other courts as involving a "'wide and indefinite range of legal and potentially illegal tactics,' including "'litigation, political appeals, requests that

regulatory agencies investigate and pursue employer violations of state and federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public.'" *Food Lion, Inc. v. UFCW*, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997)); *see also Diamond Walnut Growers v. NLRB*, 113 F. 2d 1259 (D.C. Cir. 1997); *Smithfield Foods v. UFCW*, 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008).

Richard Trumka, Secretary-Treasurer of the AFL-CIO, has similarly stated: "Corporate campaigns swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow." Manheim, *The Death Of A Thousand Cuts: Corporate Campaigns And The Attack On The Corporation* (Lawrence Erlbaum Assoc. 2001). *See also* La Botz, *A Troublemakers Handbook* 127 (Labor Notes 1991) ("Every law or regulation is a potential net in which management can be snared and entangled. A complaint to a regulatory agency can cause the company managerial time, public embarrassment, potential fines, and the cost of compliance.").

The result of such union campaigns is often a perversion of the union organizing process, having little to do with the wishes of employees to organize or refrain from organizing, and having much more to do with the great expense to which targeted employers are subjected and what they will do to end the extortion. *See* Northrup, *Corporate Campaigns: The perversion of the Regulatory Process*, 17 J. LAB. RES. 345 (1996). Union corporate campaigns have

been directly connected with demands from the unions to targeted businesses for "top down" organizing assistance agreements. *See* Ellis, *Unions Use Smear Tactics in Corporate Campaigns,* HumanEvents.com (April 23, 2007); Stewart, *"Neutrality" and "Card Check" Agreements: Union Assaults On Employee Rights And The Integrity Of The National Labor Relations Board*, Vol. 27 J. Lab. Res. 443 (Fall 2006). *See also* Eaton & Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42 (2001); Hiatt & Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176 (1996).

It is also well documented that union success rates in organizing campaigns increase where the union is able to obtain employer assistance. *See* Cohen, *Resisting Its Own Obsolescence – How The national Labor Relations Board Is Questioning The Existing Law Of Neutrality Agreements,* 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 523 (2006); Eaton & Kriesky, *supra*, 55 Indus. & Lab. Rel. Rev. at 51-53; Cooper, *Privatising Labor Law: Neutrality/Check Agreements And The Role Of The Arbitrator,* 83 Ind. L.J. 1589, 1593-94 (2008).

In any event, common sense dictates that unions would not engage in the level of expense and effort required to sustain such corporate campaigns, often over many years, if they did not assign considerable value to the organizing assistance that they demand from the targeted employers. This fact alone belies the Fourth Circuit's claim that the types of organizing assistance at issue in this case are not

"things of value" to labor unions, which Section 302 does not allow employers to provide.

Not all "neutrality agreements" are equal in the eyes of the law. *See* Cohen, *supra*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 523 (2006).[2] Some pre-recognition agreements may be truly "neutral," whereas those like the agreement at issue here go beyond mere neutrality by unlawfully "assisting" union organizing. The Fourth Circuit acknowledged that the National Labor Relations Board (NLRB) engages in "intensive inquiry" of individual neutrality agreements in order to determine whether particular provisions constitute unlawful "assistance" to unions under Section 8(a)(2) of the National Labor Relations Act. Pet. App. 13a-14a, n.1. Yet in the present case, the court of appeals refused to meaningfully analyze the specific benefits afforded to the union by the employer under their current agreement. Had the court done so, or allowed the Petitioner to offer proof of the tangible value of such benefits, the court should have found that the agreement provided a thing of value to the union that violated Section 302.

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[2] As described by Cohen's article: "The elements of 'typical' neutrality agreements fall across a wide continuum of 'intrusiveness,' from those that are moderately intrusive of an employer's operations and the activities of the affected employees, to those that significantly impact operations and activities." *Id.* The provisions of the agreement at issue are among the most intrusive, thereby providing the greatest possible organizing assistance to the union, and clearly a "thing of value."

The Fourth Circuit ultimately did not address some of the most egregious aspects of the agreement at all, instead lumping all of the agreement's provisions together as mere "ground rules" for organizing. Pet. App. 10a.[3] The court specifically failed to address the company's agreement to make its employees available on paid time (as well as on company property). By thus declining to examine the true value of individual aspects of the agreement, the court of appeals abdicated its responsibility to enforce the plain language of Section 302.

The *Amici* agree with the Petitioner that the Fourth Circuit's decision, along with the holding of the Third Circuit in the *Sage Hospitality* case,[4] creates a conflict in the circuits as to the meaning of the term "thing of value." Without repeating the Petitioner's analysis here, it is undeniably important to law enforcement generally that common terms be consistently defined across the several criminal statutes where such terms are used. The Fourth Circuit departed from this principle without explanation or serious analysis. For this reason as

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[3] The Fourth Circuit thus gave little attention to the fact that the agreement at issue here was found by the NLRB's General Counsel to violate Section 8(a)(2) of the Act, a finding which implicitly conveys that the agreement gave an unusually valuable benefit to the union which should have implicated the "thing of value" prohibition of Section 302. See Pet. App. 20a.

[4] *Hotel Employees Union v. Sage Hospitality*, 390 F. 3d 206 (3d Cir. 2004).

well, the Petition should be granted and consistency in law enforcement should be restored.

The net effect of the court of appeals decision is to create a perverse incentive for unions to extort organizing assistance from employers using the device of corporate campaigns. This was not the intent of Congress, as evidenced by the plain language of Section 302. Organizing assistance, at least in the forms presented by the agreement at issue here, is certainly a thing of value which unions should not be allowed to extort from employers in order to "seek to represent employees." *Id.* The Petition should therefore be granted so that the balance of labor relations can be restored.

CONCLUSION

For the reasons set forth above and in the Petition, the Petition should be granted.

Respectfully submitted,

Maurice Baskin
Venable LLP
575 7th St., N.W.
Washington, D.C.
(202) 344-4000

Counsel for *Amici*